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**Bills and Notes
Guaranty and Suretyship
Insurance
Bankruptcy**

EXAMINATION QUESTIONS

BY
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CHAPTER I.

INTRODUCTORY.

SECTION 1. THE LAW MERCHANT.

The "law merchant," or the *lex mercatoria*, was a special system of laws governing merchants and mercantile transactions, which was in force during the latter half of the medieval period of history, not only in England but also in all the countries of western continental Europe. This law was administered in special courts, which were, in the main, conducted by the merchants themselves. The effect of this was to harmonize the *lex mercatoria* in the different countries.

"The merchant traders traveling from fair to fair might form part of a court at St. Ives to-day and in a few weeks they might be found in one of the European marts forming a part of the market court there. It would be preposterous to imagine that courts so constituted should enforce one principle at Bristol and another at Ypres. The same questions were constantly arising, and they were doubtless decided the same way in all places, whether at Lyons, Antwerp, Winchester, or St. Ives, to which places the merchants flocked from afar at the season of the fairs."¹

The principal subjects covered by the law merchant were admiralty, insurance, and bills and notes. In its earlier stages only a very small part of this body of law was concerned with the subject of bills and notes; but the importance of these subjects rapidly increased, until to-day the law merchant is mainly

¹ Street's Foundations of Legal Liability, Vol. II, p. 328.

remembered and referred to in connection with these branches of the law.

The best account of the law merchant and the scope of its authority is that found as an appendix to the first volume of Cranch's Reports of the Supreme Court of the United States, some selections from which are here inserted:

"1. In order to ascertain how the law stood before that statute it may be necessary to examine how far the custom of merchants, of the *lex mercatoria*, was recognized by the courts of justice, and by what means the common law forms of judicial proceedings were adapted to its principles.

"A distinction seems to have been made very early between the contracts of merchants (especially of foreign merchants) and those of other people. Nearly six hundred years ago we find their 'old and rightful customs' protected by the great charter of English liberties. (Magna Charta, c. 30.) Peculiar privileges were also granted them more than 500 years ago by the statute of Acton Burnel de mercatoribus, 11 Edw., 1, and the statute of merchants, 13 Edw., 1. And in the reign of Edw. III, many statutes were made for their encouragement, in some of which, particularly 27 Edw. III, c. 19 and 20, the law merchant is expressly recognized. In the 13 Edw. VI, 9, 10 (cited by Molloy, book 3, c. 7, No. 15), it is said that 'a merchant stranger made suit before the King's privy council, for certain bales of silk feloniously taken from him, wherein it was moved that this matter should be determined at common law; but the Lord Chancellor answered, that this suit is brought by a merchant who is not bound to sue according to the law of the land, nor to tarry the trial of twelve men.'

‘The custom of merchants is mentioned in 34 H. VIII, cited in Bro. Abr., tit. Customs, pl. 59, where it was pleaded as a custom between merchants throughout the whole realm, and the plea was adjudged bad, because a custom throughout the whole realm was the common law. And for a long time it was thought necessary to plead it as a custom between merchants of particular places, viz., as a custom among the merchants residing in London and merchants in Hamburg, &c. By degrees, however, the courts began to consider it as a general custom. Co. Litt., 182; 2 Inst., 404. And in the time of James I, Ch. J. Hobart, in the case of Vanheath vs. Turner, Winch., 24, said, that ‘the custom of merchants is part of the common law, of which the judges ought to take notice.’ It was still, however, deemed necessary to set forth the custom specifically; and in that form the precedents continued for some time after. Indeed, the pleadings continued in that form long after the courts had decided it to be unnecessary. Lord Coke, in his Commentary on Littleton (first published in 1628), folio 182, a., speaking of the *lex mercatoria*, says, ‘which, as hath been said, is part of the laws of this realm.’ See, also, 2 Inst., 404.

‘But after this, in the year 1640, in Eaglechild’s Case, reported in Hetly, 167, and Lit. Rep., 363, 6 Car. I, it was said to have been ruled in B. R. ‘that upon a bill of exchange between party and party who were not merchants, there cannot be a declaration upon the law merchant; but there may be a declaration upon assumpsit, and give the acceptance of the bill in evidence.’

‘This decision seemed to confine the operation of the law merchant, not to contracts of a certain

description, but to the persons of merchants; whereas the custom of merchants is nothing more than a rule of construction of certain contracts. Jac., Law Dict., Toml. edit., tit. Custom of Merchants. Eaglechild's Case, however, was overruled in the 18 Car. II B. R. (1666), in the case of Woodward vs. Rowe, 2 Keb., 115, 132, which was an action by the indorsee against the drawer of a bill of exchange. 'The plaintiff counted on the custom and law of the realm, that if any man writes a bill to another, then if he to whom the bill is directed, do not pay for the value received by the maker, the maker of such bill should pay.' 'It was moved in arrest of judgment, that this count is ill, the general custom being the law; and it doth not appear to the court that there is any such law. *Sed curia contra*, that by the common law a man may resort to him that received the money, if he to whom the bill was directed, refuse.' It was afterwards moved again that this 'is only a particular custom among merchants, and not common law; but, *per curiam*, the law of merchants is the law of the land; and the custom is good enough generally for any man, without naming him merchant; judgment pro plaintiff, *per totam curiam*, and they will intend that he, of whom the value is said to be received by the defendant, was the plaintiff's servant.'

'The same principle was, two years afterwards, recognized in an anonymous case (but believed to be Milton's Case, vide 1 Mod., 286), in the exchequer, reported in Hardres, 485 Mich., 20 Car. II (1668), where the plaintiff declared on the custom of England, and after verdict, Offley moved in arrest of judgment, because the 'plaintiff had declared that *per consuetudinem Angliae*, etc., which he said was naught,

because the custom of England is the law of England, and what the judges are bound to take notice of; and that therefore the *consuetudo Angliae* ought to have been omitted.'

'But the chief baron said: 'But for the plaintiff's inserting the custom of the realm into his declaration here, I hold that to be mere surplussage and redundancy, which does not vitiate the declaration.' And again he says: 'It were worth while to inquire what the course has been amongst merchants; or to direct an issue for trial of the custom among merchants in this case; for although we must in general take notice of the law of merchants; yet all their customs we cannot know but by information.' Afterwards, in declaring their opinions, the court said, 'that this course of accepting bills being a general custom amongst all traders both within and without the realm, and having everywhere that effect to make the acceptor subject to pay the contents, the court must take notice of that custom.'

'Notwithstanding these decisions, the question was again made about twenty years afterwards, in the case of *Carter vs. Downish*, 1 W. & M. anno 1688, 1 Shower, 127, in the exchequer, on a writ of error from the King's bench. The defendant had covenanted to pay all bills which should be drawn on him in favor of the plaintiff on account of 1,000 kentles of fish, and the breach assigned was the non-payment of a certain bill. The defendants pleaded that the plaintiff by indorsement on the bill, according to the custom of merchants, appointed the payment to Herbert Alwyn or his order, who indorsed it to Tassel, to whom the defendant paid it. To this plea there was a demurrer and joinder. One of the errors as-

signed was, that the defendant had not set forth a particular custom to warrant the indorsement. To which it was answered, 'that the law and custom of merchants warrant the indorsement of foreign bills of exchange, and for that all the book cases on foreign bills are a proof; and that such indorsement doth really transfer the property of the money, or contents in such bills to the indorsee, and that all this law of merchants is part of the law of the land, and the judges are obliged to take notice of that as well as of any other law.' And the following cases were cited: 1 Inst., 182, a; 2 Inst., 58, 204; F. N. B., 117, Reg. 135; 13 Edw. IV., 9; 4 Rep., 76; Holland's Case; Fitz. Abr. Tit. Account, 127.

"Lord Chief Justice Pollexfen. 'As to that of the law of merchants, I think we are bound to take notice of it, as we do of that of survivorship and account, and this is as well known.'

"Sir Matthew Hale, in his history of the common law of England, first published in 1713, 3d Edit., pgs. 24, 25, speaking of the common law, as it is taken in its proper and usual acceptation, says: 'And besides these more common and ordinary matters to which the common law extends, it likewise includes the laws applicable to divers matters of very great moment, and though by reason of that application the said common law assumes diverse denominations, yet they are but branches and parts of it; like as the same ocean, though it many times receives a different name from the province, shire, island or country to which it is contiguous, yet these are but parts of the same ocean.'

"Thus the common law includes *lex prerogativa*, as it is applied with certain rules to that great business

the King's prerogative; so it is called *lex forestae*, as it is applied under its special and proper rules to the business of forests; so it is called *lex mercatoria*, as it is applied under its proper rules, to the business of trade and commerce.'

'To these authorities will be added only that of Christian, in his note to 1 Bl. Com., 75. 'The *lex mercatoria*, or custom of merchants, like the *lex et consuetudo parliamenti*, describes only a great division of the law of England. The laws relating to bills of exchange, insurance, and all mercantile contracts are as much the general laws of the land, as the laws relating to marriage or murder.'

'This chronological list of authorities tends to elucidate the manner in which the custom of merchants gained an establishment in the courts of law, as part of the common or general law of the land, and shows that it ought not to be considered as a system contrary to the common law, but as an essential constituent part of it, and that it always was of co-equal authority as far as subjects existed for it to act upon. The reason why it was not so recognized by the courts, and reduced to a regular system as soon as the laws relating to real estate, and the pleas of the crown, seems to be, that in ancient times the questions of a mercantile nature in the courts of justice bore no proportion to those relating to the former subjects. Before the time of James I., we have scarcely a mercantile case in the books, and yet long before that time the laws respecting real estate and the criminal code were nearly as well understood as they are at this day. Hence it cannot be a matter of great surprise, that the principles of commercial law which have been developed by the exigencies of modern

times, should have been by some considered as exceptions from the general principles of the common law. The truth seems to be that the principles of the common law have not been changed, nor innovated upon by the introduction of those commercial principles, but that these principles have existed from the earliest times, even from the rudest state of commerce, and the only reason why we do not find them in the ancient books is that the circumstances had never occurred which rendered it necessary to draw them forth into judicial decision.

“Another reason perhaps why we see so much tardiness in the courts in admitting the principles of commercial law in practice has been the obstinacy of judicial forms of process, and the difficulty of adapting them to those principles which were not judicially established until after those forms had acquired a kind of sanctity from their long use. Much of the stability of the English jurisprudence is certainly to be attributed to the permanency of those forms, and although it is right that established forms should be respected, yet it must be acknowledged that they have in some measure obstructed that gradual amelioration of the jurisprudence of the country which the progressive improvement of the state of civil society demanded. It required the transcendent talents, and the confidence in those talents which were possessed by Lord Mansfield, to remove obstructions. When he ascended the bench he found justice fettered in the forms of law. It was his task to burst those fetters, and to transform the chains into instruments of substantial justice.

“From that time a new era commenced in the history of English jurisprudence. His sagacity di-

covered those intermediate terms, those minor propositions, which seemed wanting to connect the newly developed principles of commercial law with the ancient doctrines of the common law, and to adapt the accustomed forms to the great and important purposes of substantial justice, in mercantile transactions."

The law merchant, after having been at first administered in special courts, next passed under the jurisdiction of the admiralty courts,² and finally became merged in the general body of the common

* "During the time of the Tudors this court claimed a wide jurisdiction. In fact it drew to itself practically all cases in any way dependent upon the principles of the law merchant. It comprised all mercantile and shipping cases. All contracts made abroad, foreign bills of exchange, charter parties, insurance, average, freight questions arising out of negligent navigation, breaches of warranty of seaworthiness, as well as torts committed on the sea and matters of salvage, were all litigated in the Admiralty Court. It was in fact during the sixteenth century the great organ through which the principles of the law merchant were declared.

"But scarcely had the Admiralty Court attained to this position, when the common-law judges began to look with envious eyes at the wide and rich field which the development of commerce brought within the jurisdiction of the admiral. Accordingly, in the reign of Elizabeth, the common-law judges began war upon him. The most effective instrument was found to be the writ of prohibition, and this weapon was accordingly used with vital effect. Coke was raised to the bench in 1606

and took the lead in the contest. As was once said by Buller, Coke seemed to have not only a jealousy, but a positive enmity against the admiralty jurisdiction.

"Notwithstanding the fact that the procedure of the Admiralty Court was vastly better adapted to the settlement of controversies over which that court had acquired jurisdiction, political events told heavily against it in the contest. The common-law judges were in closer touch with the revolutionary forces. The result of the Civil War and the establishment of the Commonwealth insured the victory of the common-law over its rival. The jurisdiction of the Admiralty Court was thereby reduced to a low ebb. Much of the lost ground has been recovered to this court by modern legislation. The point here to be noted is that the common-law judges under the leadership of Coke wrested from the admiralty general jurisdiction over commercial causes. The extent of the victory could not at the time be fully appreciated, for English commerce was destined to expand beyond the most sanguine expectations." Street's *Foundation of Legal Liability*, Vol. II, p. 332-3

law, and administered in the regular common law courts of the country.

SECTION 2. BILLS AND NOTES.

Bills of exchange are undoubtedly of Italian origin,³ and were first used about the beginning of the thirteenth century.⁴ The use of these instruments was rapidly spread throughout all Western Europe by the Italian bankers and money-changers. Early bills of exchange contained no words of negotiability.

³ All of the early specimens of these instruments which are extant are written in Italian, even when neither drawn nor payable in Italy.

⁴ "The precise era of that most useful invention does not appear to have been exactly ascertained; but that it originated * * * in the usages and customs observed and in the regulations adopted at fairs, from considerations of general security and convenience, there is every reason to believe. And after it was once established upon a small scale, the utility and convenience of the invention behooved gradually to lead to its more extensive adoption, particularly in foreign and maritime commerce. Indeed, it seems probable that bills of exchange, such, or nearly such, as we have at present, first came into general use in the course of the ex-

tended commerce carried on by the maritime cities of Italy, and of the south of France and Spain, under their comparatively free and well-administered governments. Weber in his *Ricerche sull' Origine e sulla Natura del Contratto di Cambrio*, published at Venice in 1810, states positively that such documents were in use at Venice in 1171; and a law of Venice of 1272 clearly designates bills of exchange. The unpublished statute of Avignon, of 1243, contains a paragraph entitled *De Litteris Cambii*. A statute of Marseilles, dated 1253, presents evident traces of them; and a transaction of this description is attested by a document of 1256, relative to England." Reddie's *Historical View of Laws of Maritime Commerce*.

CHAPTER II.

NEGOTIABLE INSTRUMENTS.

SECTION 3. BILLS OF EXCHANGE.

A bill of exchange is an unconditional order in writing for the payment of a certain sum of money absolutely and at all events.¹ Bills of exchange are either inland or foreign. An inland bill of exchange is one payable in the same state or country in which it is drawn. A foreign bill of exchange is one payable in some state or country other than that in which it is drawn.

There are three original parties to a bill of exchange: the drawer (who draws the order, or in other words, orders the payment of the money), the payee (in whose favor the order is drawn), and the drawee (on whom the order is drawn).

SECTION 4. THE ORDER.

The most essential characteristic of a bill of exchange is the order to pay. No particular words are necessary, but there must be an absolute order to pay.² There must be something more than the asking of a favor,³ or the conferring the authority to make payments if the drawee chooses to do so.⁴

¹ Some other definitions are as follows: "An unconditional order from A to B directing B to pay C a certain sum of money therein named." *Byles on Bills*. "An unconditional order in writing addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand, or at a fixed or determinable future time, a sum certain in money to or to the order

of a specified person or to bearer." *English Bills of Exchange Act*, Sec. 3.

² *Patterson vs. Poindexter*, 6 W. & S. (Pa.), 227, 40 Am. Dec., 554; *Little vs. Slockford*, M. & M., 171, 22 E. C. L., 280.

³ *Ellar's Case*, 1 Block, C. C., 323, where the following was held not to be a bill: "Please to send £10 by bearer, as I am so ill I cannot wait upon you."

⁴ *Hamilton vs. Spottiswoode*, 4 Exch., 200.

SECTION 5. PROMISSORY NOTE.

A promissory note is an unconditional promise in writing for the payment of a certain sum of money absolutely and at all events.⁵ There are only two original parties to a promissory note, the maker (who makes the note and promises to pay the money) and the payee (in whose favor the note is made).

SECTION 6. ESSENTIALS OF BILLS AND NOTES.

Although bills and notes differ from each other in the nature of the contract created by each,⁶ the law governing each is in most of its essentials the same. The common essential characteristics of these two species of negotiable instruments will be considered in the following sections.

SECTION 7. CERTAINTY OF TERMS.

One of the most striking characteristics of the laws governing bills and notes is the necessity for certainty in the terms of the contracts. First of all

⁵ American and Eng. Ency. of Law, Vol IV, p. 77. This is the definition of Chancellor Kent slightly modified. Other definitions are as follows:—"An open promise in writing by one person to pay another person therein named, or to his order or to bearer, a specified sum of money absolutely and at all events." Daniels on Negotiable Instruments, Sec. 28: "An unconditional promise in writing made by one person to another signed by the maker, engaging to pay on demand, or at a fixed or determinable future time, a certain sum in money to or to the order of a specified person or to bearer." Eng. Bills of Exchange Act, Sec. 83.

⁶ "Bills and notes are governed by the same rules with respect

to the certainty required in their terms and their general elements, but, at its inception, a note differs from a bill in the parties thereto. Only the rights of the maker and the payee are involved in a promissory note; when, however, the payee transfers the note to an indorsee the similarity of the note to an accepted bill is perfected; it is then an order from the payee upon the maker for the payment of money to the indorsee; the indorser (payee) is the drawer, the maker of the note is the acceptor, and the indorsee is the payee. Remembering this analogy, decisions with regard to bills may be applied mutatis mutandis to notes." Am. & Eng. Ency. of Law, Vol. IV, p. 79.

there must be certainty of payment. The order or promise must be for the payment of a definite sum of money, absolutely and under all circumstances.

Certainty as to time of payment is essential to a bill or note, and any contingency in this respect will render the instrument containing it non-negotiable.⁷ Exceptions to this last rule exist in conditions sanctioned by commercial usage as to demand, presentment, or sight,⁸ and contingencies when the payment depends on an event which is bound to ultimately happen.⁹

The amount of the payment to be made must be certain at the time the order or promise is given. It is sufficient if the amount to be paid at any given time can be ascertained from the face of the note;¹⁰ but it is not sufficient that the amount payable is capable of being rendered certain at some future time.¹¹

SECTION 8. NECESSITY FOR PAYMENT IN MONEY.

Except as modified by statutory provisions, bills of exchange and promissory notes must be for the payment of money only.

"Instruments ordering or promising the payment of a certain amount in specific articles,¹² or in bonds, notes or checks,¹³ or ordering or promising the delivery of certain goods or chattels,¹⁴ are not obligations for money, and consequently are not valid bills of exchange or promissory notes. But, by statute in many states, such instruments are given the qualities of negotiable instruments.¹⁵

⁷ Protection Ins. Co. vs. Bill, 31 Conn., 539.

⁸ American and English Ency. of Law, Vol. IV, p. 90.

⁹ Chicago R. Equipment Co. vs. Merchants Bank, 130 U. S., 268.

¹⁰ Smith vs. Crane, 33 Minn., 144; 53 Am. Rep., 20.

¹¹ Stillwell vs. Craig, 58 Mo., 24.

¹² Perry vs. Smith, 22 Vt., 301.

¹³ Easton vs. Hyde, 13 Minn., 90.

¹⁴ Morris vs. Lynde, 73 Me., 88.

¹⁵ Stewart vs. Smith, 23 Ill., 397.

"Mercantile paper may be given for the payment of a certain sum in denominations of foreign money,"¹⁶ but whether an instrument payable generally in money or currency of a foreign state is negotiable is not settled."^{17 18}

A bill or note may be made payable in one particular denomination or kind of money.¹⁹

SECTION 9. NEGOTIABILITY.

The most striking characteristic of both bills and notes at the present day is their negotiability. This quality, however, did not exist at first.²⁰

¹⁶ *King vs. Hamilton*, 12 Fed Rep., 478.

¹⁷ *Souther vs. Wallace*, 20 Nova Scotia, 509; 16 Can. Sup. Ct., 717.

¹⁸ *Am. & Eng. Ency. of Law*, Vol. IV, p. 105.

¹⁹ *Chryster vs. Renois*, 43 N. Y., 209.

²⁰ "It now becomes necessary to begin again near the same point of departure and trace the gradual recognition of the transferability of bills of exchange. Hitherto we have observed no traces of a custom to make bills of exchange payable to order or bearer. Just when this custom originated cannot be stated with certainty. It embodied a happy thought. That the bill of exchange should become negotiable was indispensable to growing commerce. Hartmann, a late German writer on bills of exchange, states that the first known instance of the endorsement of these instruments occurs in the Neapolitan Pragmatica of 1607. Savary is said by the French writer, M. Nougier, to have assigned it to a later date, to-wit, 1620. In England the law of bills was somewhat less advanced than on the continent, and we have good evidence that bills were never, in Eng-

land, made payable to order or bearer until after 1622."

"John Marius published, in 1651, a small treatise concerning bills of exchange. It was republished about 1670 with some emendations and additions. In the preface to this edition he says his work is the fruit of twenty-four years' experience as a Notary Public in the Royal Exchange of London."

"It is to be inferred from his preface that the usage and practice concerning bills of exchange were substantially the same in 1651 and 1670, and whatever advances in theory his treatise shows over Malynes's earlier essay (1622) belongs to the period between 1622 and 1651, rather than to the period from 1651 to 1670. This inference is corroborated by what we learn from other sources."

"The striking feature of the bill of exchange in Marius's pages is that words of negotiability have been inserted. He gives us a dozen specimens, all dated 1654. Each contains the words 'to A or order,' or 'to A or assigns.' The idea seems to be that 'or assigns' should be used if the rights consequent upon transfer are likely to be

Even today, "while negotiability is the characteristic quality of bills and notes, it is not essential to their validity."²¹ Non-negotiable instruments may be declared upon as bills and notes,²² have been held to import a consideration,²³ and are entitled to days of grace.²⁴ By indorsing such an instrument the payee becomes liable to the indorsee,²⁵ but the latter

questioned in England. The other phrase belongs to bills going into foreign parts or drawn in a foreign language."

"Another equally striking feature is that the custom of merchants now includes bills drawn in England upon another city within the realm. Marius describes himself as a notary of twenty-four years' standing for both inland and outland bills. In 1608, John Trenchant had observed in his arithmetic, printed at Lyons, that real exchange could only take place between cities subject to different lords. Neither does Malynes give recognition to inland bills. Marius takes some pains to vindicate their right to be placed upon the same footing as foreign bills. "A bill of exchange which shall be made for moneys taken up in Edinborough, York, Bristol, Exon, Plymouth, Dover, or any other part of England or Scotland, and payable at London, is in all things as effectual and binding as any bill of exchange made beyond the seas and payable here in England."

* * * The inland and outland bills ought to be esteemed of equal worth and the custom of merchants on both equally observed."

"Both classes of bills being made payable to order or assigns, they were now transferable by indorsement, or, as he calls it in both cases, by assignment. He gives the following illustration of assignment by two successive holders: Pay the contents on the other side hereof to Mr. Humfrey N., or assigns, value of Mr.

Joseph B., Rotterdam, Oct. 4, 1654. Roger C.' The second indorsement is briefer: 'Pay the contents hereof to Mr. John D. (Signed) Humfrey N.'

"He carefully states the effect of an indorsement in blank. It was sufficient to pass the title and authorize the holder to write a special indorsement to himself or a receipt in full over the signature.

"The effect of the absence of words of negotiability is stated in these terms: 'If the bill be made payable positively to such a man, and not to such a man or his assigns, or order, then an assignment on the bill will not serve the turn, but the money in the strictness of the letter must be immediately paid to such a man in person, and he must be known to be the same man mentioned in the bill of exchange, so that the money may not be paid to a wrong party, and so the acceptor forced to pay it twice. And if the bill be made payable positively to such a man as hath been said, such a man's name written on the back side of the bill in blank, is no sufficient warrant for another man to come (as in his name) to receive the money, but the man himself, to whom the bill is payable, must appear in person.'" Street's Foundations of Legal Liabilities, Vol. II, pp. 354 et seq.

²¹ *Coursin vs. Ledlie*, 31 Pa. St., 506.

²² *Kendall vs. Galvin*, 15 Me., 131; 52 Am. Dec., 141.

²³ *Arnold vs. Sprague*, 34 Vt., 402.

²⁴ *Reed vs. Murphy*, 1 Ga., 236.

²⁵ *Bristol vs. Warner*, 19 Conn., 7.

cannot, independently of statute, sue the maker or drawer." ^{26 27}

In the case of *Arnold vs. Sprague*²⁸ the Court said: "It is not essential to the validity of a bill of exchange or promissory note that it should be negotiable. The advantages arising from the negotiability of such instruments were originally the reason why they were held to be exceptions to the general rule of the common law that cases in action were not assignable; hence it was once considered that negotiability was essential to such instruments. But for a long time, both in this country and in England, it has been held, and is now settled law, that they need not be negotiable."

SECTION 10. CONSIDERATION.

Between the immediate parties a consideration is as necessary in the case of a bill or note as in the case of any other kind of contract.²⁹ One who signs or indorses a note after it has been negotiated does not incur any liability, unless there is some other consideration.³⁰ Bills and notes, however, are presumed to be given for a consideration, and the burden of proof is on the party alleging the contrary.³¹

A Circuit court of the United States said on this point in *Lipsmeier vs. Vehslage*.³²

"This suit is based on a promissory note negotiable in form. The plaintiff sues as indorsee of said note. The ordinary rule of law governing paper of this kind is that it imports on its face a consideration,

²⁹ *Davis vs. Helm*, 34 Mo. App., 332.

³⁰ *Am. & Eng. Ency. of Law*, Vol. IV, page 80.

³¹ 34 Vt., 402.

³² *Boutell vs. Cowding*, 9 Mass., 254;
Clement vs. Reppard, 15 Pa. St., 111.

²⁸ *Good vs. Martin*, 95 U. S., 90;
Harwood vs. Kiersted, 20 Ill., 367.

³¹ *Bristol vs. Warner*, 19 Conn., 7;
Whitney vs. Clary, 145 Mass., 159.

³² 29 Fed. Rep., 175.

in other words, that the party who gave the note entered into an obligation to pay the same, for pecuniary reasons, whereby the payee would be entitled to recover on the face of the paper. This note was transferred, as admitted, after maturity. If it had been transferred for value, to an innocent party, before maturity, the defenses that are submitted to you would not be considered. But it so happens, admittedly, that this note was transferred long after maturity; consequently you are to determine the respective rights of the parties as if Mr. Beckerman, the payee in the note, himself was suing here. In other words, the equities of the original transaction are open for inquiry.

"This note was given, it seems, February 1, 1878, negotiable by its terms—a note payable in one year, and transferred long thereafter to this plaintiff. Some very nice questions have been presented to the court, under the statute of the United States, as to the jurisdiction of this tribunal, concerning which, in the present aspect of the case, it is unnecessary to trouble you. The court decides that the party is rightfully in court, and consequently the matter is submitted to you, and the questions of fact are—

"First, was there any consideration for this note? If not, you must find for the defendant. But the duty of showing that there was no consideration rests on the defendant. Notes of this character import consideration. In other words, the plaintiff is not bound to prove that the note was given for consideration, because, when a party signs paper of this kind, he admits, impliedly, that there was a good reason for so doing—a valid reason. Consequently the burden is cast upon the defendant to show that

there was no consideration. Notes sometimes may be given for the accommodation of the payee, or for any other than valid reasons. If so, it being the nature of a gift, the mere voluntary act from one to another, there is no obligation in law, if he chooses not to pay the note, for him so to do, by judicial process."

SECTION 11. DELIVERY.

No contract is made and no rights are created upon a bill of exchange or promissory note until its delivery.³³ The delivery of such bill or note is included in its making.³⁴ Until delivery a bill or note is revocable and unenforceable.³⁵ By delivery is meant a transfer of the possession of the instrument with intent to transfer the title thereto, and the acceptance thereof with the intention of receiving title.³⁶

SECTION 12. DAYS OF GRACE.

"Days of grace are days added to the nominal time of payment of all bills or notes except those impliedly or expressly payable on demand, and are computed by excluding the day of date and including the day of payment."³⁷

Days of grace were originally only allowed to the drawee of a foreign bill to allow him to provide funds for its payment. They were later extended by the common law to other forms of negotiable instruments, but have now been very largely abolished by statute.

³³ *Dexter Savings Bank vs. Cope-*
land, 77 Me., 263.

³⁴ *Mitchell vs. Conley*, 13 Ark., 414.

³⁵ *Hinsdale College vs. Thomas*, 40
Wis., 661; *Roberts vs. Mc-*
Grath, 38 Wis., 52.

³⁶ *Am. & Eng. Ency. of Law*, Vol.
IV, page 202; *Kinne vs. Ford*,
52 Barb. (N. Y.), 194; *Curtis*
vs. Gorman, 19 Ill., 141.

³⁷ *Norton on Bills and Notes*, Sec.
40.

CHAPTER III.

ACCEPTANCE OF BILLS OF EXCHANGE.

SECTION 13. IN GENERAL.

The acceptance of a bill of exchange is an agreement generally on the part of the drawee, but sometimes on the part of some other party, to pay the bill absolutely according to its tenor, or according to special terms contained in the contract of acceptance.¹ The holder of a bill has the right to demand a general and unqualified acceptance in writing upon the bill itself, and may refuse to accept any qualified acceptance.

“Where a draft is given directing the drawee to pay absolutely a sum of money to the payee it is the right of the payee to have an unconditional and unqualified acceptance of the same; and if he chooses, without the consent of the drawer, to take a conditional, limited, or qualified acceptance of the draft, he thereby releases the drawer from all liability on the draft.”²

SECTION 14. LIABILITY OF ACCEPTOR AND DRAWER.

The drawer of a bill is under no legal obligation to accept the bill, even if he is indebted to the drawer to the amount of the bill, or has funds of the drawer in his possession to that amount,³ unless he has for a valuable consideration expressly⁴ or impliedly⁵ agreed

¹ *Cox vs. National Bank*, 100 U. S., 712; *Clark vs. Cock*, 4 East, 57.

² *Gibson vs. Smith*, 75 Ga., 33.

³ See *Whitty on Bills*, 28.

⁴ *Laing vs. Barclay*, 1 B. & C., 398; 83 O. L., 170.

⁵ *Helm vs. Meyer*, 30 La. Ann., 943.

Where funds are sent to a person for the purpose of meeting a bill drawn upon him, and he retains same without objection or promise to accept, it will be implied.

to accept it. When a drawee has thus agreed to accept a bill he is liable in damages for the breach of his contract,⁶ the measure of damage being the inconvenience and loss caused to the drawer by the drawee's failure to accept.⁷

Upon acceptance the drawer, now the acceptor, becomes the principal debtor and the party primarily liable for the payment of the bill.⁸ The liability towards the holder, of the acceptor of a bill of exchange, is the same as that of the maker of a promissory note, and is governed by the same rules.⁹

The acceptance of a bill by the drawee admits everything essentially to the validity of a bill,¹⁰ including the existence of the drawer, the genuineness of signatures,¹¹ the inviolacy of the body of the bill,¹² the capacity of the parties,¹³ the authority of the parties,¹⁴ and that there were funds of the drawer in the hands of the acceptor.¹⁵ None of the facts thus admitted can be disputed in a suit by a bona fide holder for value, but as between the immediate parties to the instrument the true state of facts can be shown.

SECTION 15. WHO MAY ACCEPT.

Except in the case of an acceptance *supra protest*, the acceptance must be made by the drawee of the bill, and acceptance by any other person is not permitted under the law merchant.¹⁶ An acceptance by the suc-

⁶ *Riggs vs. Lindsay*, 7 Cranch (U. S.), 500.

⁷ *Prehn vs. Royal Barb L. R.*, 5 Exch., 92.

⁸ *Matter of Babcock*, 3 Story (U. S.), 899; *Diversoy vs. Moar*, 22 Ill., 331; 74 Am. Dec., 157; *Marsh vs. Law*, 55 Ind., 271.

⁹ *Capital City Ins. Co. vs. Quinn*, 73 Ala., 558.

¹⁰ *Jarvis vs. Wilson*, 46 Conn., 90; 33 Am. Rep., 18.

¹¹ *Bank of Commerce vs. Union Bank*, 3 N. Y., 230.

¹² *Ward vs. Allen*, 2 Met. (Mass.), 53.

¹³ *Drayton vs. Dale*, 2 B. & C., 293; 9 E. C. L., 91.

¹⁴ *Belknap vs. Davis*, 19 Me., 455.

¹⁵ *Byrd vs. Arkansas*, 7 Ark., 321; *Gillihan vs. Myers*, 31 Ill., 525.

¹⁶ *May vs. Kelly*, 27 Ala., 477; *Heevan vs. Nash*, 8 Minn., 407; 83 Am. Dec., 790.

cessor of an official upon whom a bill is drawn is not binding.¹⁷

Where several drawees are named in a bill it may be accepted by any one of the number,¹⁸ and the same is true when a bill is addressed to two persons in the alternative.¹⁹ An acceptance can be made by an agent, but there is some doubt, in such cases, as to whether the payee is bound to receive such an acceptance.

SECTION 16. ACCEPTANCE, HOW AND WHEN MADE.

An acceptance may be made either in writing or orally. If in writing, it is held that any form of words which do not in themselves negative the request of the bill should be treated as a valid acceptance.²⁰ The following have been held to constitute a valid acceptance when written on the bill: "Seen;"²¹ "Presented;"²² "I will pay this bill,"²³ or simply the name of the drawee.²⁴ An acceptance may be made on a separate paper; but in such cases the acceptance must be clear and unequivocal.²⁵

"In jurisdictions where acceptances are not required to be in writing, or the statutes do not otherwise modify the common law, parol acceptances, if assented to by the holder, are permitted. A parol acceptance is any form of words used by the drawee which by reasonable intendment can be made to signify that he honors the bill. There are some limitations to this rule. These words are to be addressed to the drawer or holder. They must be assented to by the holder.

¹⁷ *Spalding vs. McKay*, 5 W. O. Q. B. (U. S.), 656.

¹⁸ *Smith vs. Milton*, 133 Mass., 369.

¹⁹ *Mountstephen vs. Brooks*, 1 B. & Ald., 224.

²⁰ *Leslie vs. Hastings*, 1 Moody & R., 119.

²¹ *Barnet vs. Smith*, 10 Frost (N. H.), 256.

²² *Norton on Bills and Notes*, Sec. 49; *Parson on Bills and Notes*, 282.

²³ *Ward vs. Allen*, 2 Met. (Mass.), 53.

²⁴ *Spear vs. Pratt*, 2 Hill (N. Y.), 582.

²⁵ *Coolidge vs. Payson*, 2 Wheaton, 68.

They must relate to an existing bill, for, if they pertain to a future bill, they will not be deemed an acceptance. They must be unequivocal, for, if they are equivocal, they will not be deemed an acceptance."²⁶

An implied acceptance may result from any actions on the part of the drawee which justify the holder in drawing the conclusion that the drawee intends to accept the bill.

An acceptance of a bill may be made before the instrument has been completed as a bill of exchange,²⁷ or after the maturity of the bill,²⁸ in which latter case it is construed as a promise to pay on demand.²⁹ A bill may be accepted after the death of the drawer.³⁰

SECTION 17. ACCEPTANCE SUPRA PROTEST.

An acceptance *supra protest*, or for honor, is an acceptance of a bill after protest, by a stranger to the bill, for the benefit of all subsequent parties, and for the protection of the credit of some party to the bill. An acceptance *supra protest* creates a conditional agreement to pay if the original drawee does not, and may be made either after dishonor for non-acceptance, or after protest for better security after acceptance. This last form has been described as follows:

"The custom of merchants is stated to be that if the drawee of a bill of exchange abscond before the date when the bill is due, the holder may protest it in order to have better security for its payment, and should give notice to the drawer and indorsers of the absconding of the drawee; and if the acceptor of a

²⁶ Norton on Bills and Notes, page 93.

²⁷ Pittsburgh Bank vs. Neal, 22 How. (U. S.), 97; Hopps vs. Savage, 69 Md., 513.

²⁸ Wynne vs. Raikes, 5 East, 521; Stockwell vs. Bramble, 3 Ind., 428.

²⁹ Grant vs. Shaw, 16 Mass., 343; 8 Am. Dec., 142.

³⁰ Cutts vs. Perkins, 12 Mass., 206.

foreign bill become bankrupt before it is due, it seems the holder may also in such case protest for better security. The neglect to make this protest will not affect the holder's remedy against the drawer and indorsers, and its principal use appears to be that by giving notice to the drawer and indorsers of the situation of the acceptor, or by which it is become improbable that payment will be made, they are enabled by other means to provide for the payment of the bill when due."²¹

²¹ Chitty on Bills and Notes, 383.

CHAPTER IV.

INDORSEMENTS.

SECTION 18. In GENERAL.

In its most general and literal signification, an indorsement is an incidental or subsidiary writing upon the back of a paper or document to the contents of which it relates or pertains.

"In Commercial Law an indorsement is the signatire of the payee of a note, bill or check, or that of a third person, written on the back of the note or bill in evidence of his transfer of it, or his assuring its payment, or both.

"In its strictly technical sense the term 'indorsement' is applicable only to negotiable paper, but in common parlance it is applied indifferently to bonds, bills and promissory notes, whether negotiable or otherwise."¹

"The contract of indorsement is not an independent one, but a parasite which, like the chameleon, takes the hue of the thing with which it is connected. Attached to commercial paper, it becomes a commercial contract, operating as a contingent guaranty of payment, and a transfer of the title where the paper is negotiable; attached to any other chose in action, it becomes an equitable assignment of the beneficial interest without recourse to the assignor."²

Bills and notes payable to order can only be transferred by indorsement.³ Bills and notes payable

¹ American and Eng. Ency. of Law, Vol. IV, page 256.

² Patterson vs. Paindexter, 6 W. & S., 227; 40 Am. Dec., 554.

³ An equitable title, however, may pass without indorsement by mere delivery.

to bearer may be transferred by either indorsement or delivery. Strictly speaking there can be no indorsement of non-negotiable instruments.

SECTION 19. METHOD OF INDORSEMENT.

The proper and ordinary method of indorsement is by writing upon the back of the instrument;⁴ an indorsement, however, may be made on the face of the note.⁵ In case of two indorsements on opposite ends of a note, the presumption is that the payee is first indorser, regardless of the respective position of the names.⁶ The indorsement must be on the instrument itself;⁷ a separate writing may constitute an assignment, but not an indorsement.⁸

An indorsement must be in writing,⁹ but no particular form of words is required.¹⁰ In *Herring vs. Woodhill*¹¹ the Court said on this point:

"The first point made in this case is, that the note was not properly indorsed, the transfer being on the face of the note. Literally, indorsement means a writing indorsed upon the back of the bill or note. But it is well established, that though such is its import, it may be made on the face of the bill, and numerous indorsements may be made on a separate paper called an allonge. *Yarborough vs. Bank of England*, 16 East, 12; *Rex vs. Bigg*, 1 Strange, 18; *Story on Promissory Notes*, sec. 121; *Gibson vs. Powell*, 6 Howard (Miss.), 60. And any form is sufficient which manifests an intention to transfer the note. *Morris vs. Bird*, 11 Mass., 436.

⁴ *Kern vs. Haslerigg*, 11 Ind., 443; 71 Am. Dec., 360.

⁵ *Shain vs. Sullivan*, 106 Cal., 208; *Herring vs. Woodhill*, 29 Ill., 92.

⁶ *Anderson vs. Symonds*, 85 Pa. St., 99.

⁷ *Williams vs. Osborn*, 75 Ind., 280.

⁸ *National Bank vs. Leonard*, 91 Ga., 805.

⁹ *Syracuse Third Nat. Bank vs. Clark*, 23 Minn., 263.

¹⁰ *Douglas vs. Wilkeson*, 6 Wend. (N. Y.), 637.

¹¹ 29 Ill., 92, 99.

"This indorsement is in the form of a guaranty, and is sufficient to convey and transfer the title in the note to the holder as an indorsement. *Heaton vs. Hurlbert*, 3 Scam., 489; *Partridge vs. Davis*, 20 Verm., 499. This principle is well established."

The indorsement must be signed by the indorser,¹² but no particular form of signature is necessary. A stamped indorsement is sufficient,¹³ as are also the initials¹⁴ or mark of the indorser.¹⁵ Even figures written upon the back of a bill or note have been held to be a sufficient indorsement.¹⁶

SECTION 20. FORMS OF INDORSEMENT.

An indorsement in blank is one where the indorser merely writes his name on the instrument. Such an indorsement renders the instrument payable to whoever may hold it.¹⁷ A bill or note indorsed in blank is equivalent to one payable to bearer.

Any bona fide holder of a bill or note indorsed in blank may write over the name of the indorser his own name or any contract consistent with the character of the indorsement, thus restricting the character of the indorsement.¹⁸

An indorsement in full is one containing the name of the person to whom payment is to be made. Such a note can only be collected by the payee named or his indorsee, and can only be transferred by another indorsement.¹⁹

¹² *Myers vs. Wright*, 33 Ill., 284.

¹³ *Lynn First Nat. Bank vs. Smith*, 132 Mass., 227.

¹⁴ *Merchants Bank vs. Spicer*, 6 Wend. (N. Y.), 443.

¹⁵ *George vs. Surrey, M. & M.*, 516; 22 E. C. L., 371.

¹⁶ *Brown vs. Butchers, etc., Bank*, 6 Hill (N. Y.), 443, where the figures "1, 2, 8" were held to constitute an indorsement, al-

though it was shown that the indorser could write.

¹⁷ *Peacock vs. Rhodes*, 2 Doug. 633; *Grant vs. Vaughan*, 3 Burrows, 1516.

¹⁸ *Russell vs. Langstaffe*, 2 Doug., 514.

¹⁹ *Edie vs. East India Co.*, 1 W. Bl., 295; *Hodges vs. Adams*, 19 Vt., 74.

An indorsement without recourse is one by which the indorser exempts himself from liability to the holder upon the dishonor of the bill or note. Such an indorsement leaves the indorser still liable upon the warranties existing in all cases of indorsement, such as the warranty of the genuineness of the signatures.²⁰

A conditional indorsement is one where the title does not pass until the condition mentioned in the indorsement is fulfilled.

A restrictive indorsement is a transfer of the title either for the purpose of collection, or to be held in trust. The first purpose is secured by such indorsements as "For deposit," or "For collection;" and the second by such indorsements as "Pay to A on order for account of B," or "Pay to A for my use."

SECTION 21. DUAL CHARACTER OF CONTRACT OF INDORSEMENT.

The contract of indorsement (except in a few special instances elsewhere discussed) is in reality a double contract. There is first an executed contract operating to transfer to the indorsee such title to the chose in action as the indorser possesses, and secondly, an executory contract by which the indorser undertakes that the bill or note shall be paid at maturity.²¹ The liability of an indorser under such executory contract will be discussed in the next chapter.

SECTION 22. ANOMALOUS INDORSEMENTS.

An anomalous indorsement is treated in a section by itself for the reason that it is not strictly an indorsement, but in reality more nearly a guaranty. This

²⁰ Hannum vs. Richardson, 48 Vt., 508; Challies vs. McCrum, 22 Kan., 157.

²¹ See Minor on Conflict of Laws, Sec. 165.

form of indorsement arises where the indorsement is made before the delivery of the bill or note to the payee.

“A person whose name is on the back of a bill or note, transferable by delivery, or payable to bearer, is to be deemed an indorser.

“A person signing on the back of a bill or note payable to order before the payee is *prima facie* presumed to be a second indorser, and not liable to the payee; but this may be rebutted by showing that his indorsement was given to give the maker credit with the payee, and he thus becomes liable as first indorser, the payee being permitted to indorse to him without recourse.” ²²

²² Morton on Bills and Notes, Secs. 67 and 68.

CHAPTER V.

LIABILITIES OF PARTIES.

SECTION 23. IN GENERAL.

The liabilities of the drawer and acceptor of a bill have already been considered.¹ The liabilities of the other parties to bills of exchange and promissory notes will be taken up in the following sections.

SECTION 24. THE MAKER OF A PROMISSORY NOTE.

The contract of the maker of a promissory note is the simplest of all the various contracts of the different parties to bills of exchange or promissory notes. The maker of a note is the party primarily liable thereon, and his contract is to pay it according to its tenor.² When there are two or more makers to a note, their liability is joint or several according to the wording of the instrument.³ The maker of the negotiable promissory note, by making it, admits the existence of the payee, and his capacity to indorse the note.⁴

“Where the maker of a note draws it payable to a real person, and forges his indorsement, and puts the note into circulation, in an action by a bona fide holder against the maker proof of the indorsement is unnecessary; the maker will be estopped from saying it was not genuine.”⁵

¹ See Section 14.

² Chalmers, Bills of Exchange, Art. 88; Walton vs. Mascoll, 13 M. & W., 452.

Am. & Eng. Ency. of Law Vol. IV, p. 474.

⁴ Walke vs. Kuhne, 109 Ind., 313.

⁵ Meacher vs. Fort, 3 Hill L. (S. Car.), 227.

SECTION 25. LIABILITY OF INDORSERS.

The modern doctrine as to the liability of indorsers is a comparatively recent development in the law.

"The principle that the indorser of a bill of exchange may be held liable thereon when the paper is dishonored was apparently not generally accepted as a part of the custom of merchants when Marius published the second edition of his book (1670). It was shortly accepted, however, by the law courts. This event is worthy of more than passing notice.

"In *Claxton vs. Swift* (1685),^{*} the chief justice thought liability of the indorser might be deduced from principles of equity. The indorser is chargeable because, if he makes an indorsement upon a bad bill, it is equity and good conscience that the indorsee may resort to him to make it good.

"In *Sir Bartholomew Shower's* report of this case, we find the able argument made by himself in favor of charging the indorser after the drawer had been successfully sued, but without satisfaction of the judgment. Among other things, in the course of this argument, it was said:

"The necessity of trade and commerce, and the usefulness and convenience of transferring money by bills of exchange, has introduced the same; and the civil law allowing them in other nations has occasioned their approbation here; and amongst them the rule is, *ubi literae excambii non habuerunt effectum, daret prima obligatio*, and I think the same rule ought to hold with us. This and every indorsement is as a new bill of exchange, and has all the requisites and parties that a bill has, . . . and a man that has a bill indorsed has, as it were, two bills for the same sum;

* 3 Mod., 86; 2 Show, 494.

and it is most true this action is not joint, and cannot be brought both against the drawer and indorser, for that the assumptions are at several times, and upon distinct considerations.' All of the judges, however, except the chief justice, concurred in giving judgment for the defendant; but this decision was subsequently reversed in the Exchequer Chamber. The point for which Shower contended was thus accepted as law.'

'The reason assigned for fixing liability upon the indorser is that by writing the indorsement he virtually and in fact draws a new bill. It will be perceived that this reasoning applies to the indorsement of a bill not containing words of negotiability as well as to those made payable to order or bearer. Accordingly, if a bill or note is made payable to B, without more, and B indorses this instrument to C, the latter, upon non-payment of the bill, can sue his indorser, though of course he has no right of action against the party primarily liable, for the reason that the contract is not transferable by its terms.'^{8 9}

The liability of the indorser in case of the dishonor of the bill or note is now settled beyond dispute. It is also settled that the obligation of the surety is a new and independent contract subject to the law of the place where the contract is made.¹⁰

The indorser is not released by the invalidity of the instrument.¹¹

'The nature of the obligation of an indorser is very different from that of a surety. The surety's obligation is not an independent contract, but is

⁸ *Claxton vs. Swift*, 1 Lutw., 878, 882b.

⁹ *Hodges vs. Steward* (1691), 1 Salk, 125.

¹⁰ *Street's Foundations of Legal Liability*, Vol. II, pp. 376-7.

¹¹ *Aymar vs. Sheldon*, 12 Wend. (N. Y.), 439; *National Bank vs. Green*, 33 Iowa, 140.

¹² *Morford vs. Davis*, 28 N. Y., 481; *Neil's Succession*, 24 La. Ann., 139.

identical with that of the maker, and ordinarily whatever defenses the principal succeeds in making inure to the benefit of the surety. But the obligation of the indorser is a new and separate contract, which may be valid and subsisting although the contracts of the other parties to the instrument be totally void. So distinct are the contracts of the maker and the indorser of a note, that, in the absence of statute, they cannot be joined in the same action."¹³

SECTION 26. INDORSER WITHOUT RECOURSE.

An indorser without recourse is liable only on the warranties held to be made by all transferers,¹³ and on his misrepresentations.¹⁴

SECTION 27. LIABILITY OF ACCOMMODATION PARTIES.

The accommodation party to a bill or note may hold the position either of maker, drawer, or indorser. To all persons except the person accommodated the accommodation maker or indorser is liable to the same extent as if he was a maker or indorser for a consideration. Knowledge of the mere want of consideration between the original parties is not sufficient to prevent a purchaser from becoming a bona fide holder.¹⁵ The accommodation party is of course never liable to the accommodated party, no matter what their respective relations upon the paper may appear to be; and if the accommodation party is compelled to pay the bill or note he has a right of recovery against the accommodated party.

¹³ Am. & Eng. Ency. of Law, Vol. IV, p. 478.
¹⁴ Hannum vs. Richardson, 48 Vt., 508.

¹⁵ Harton vs. Scales, Minor (Ala.), 166.

¹⁶ Palmer vs. Field, 76 Hun., 229; 27 N. Y. Supp., 736.

CHAPTER VI.

TRANSFER OF NEGOTIABLE INSTRUMENTS AND THE RIGHTS OF BONA FIDE HOLDERS FOR VALUE.

SECTION 28. TRANSFERS.

The transfer of a bill or note is either the assignment or devolution of the right to its enforcement.¹ The four methods of transfer are: (1) by assignment; (2) by operation of law; (3) by indorsement; (4) by delivery.

A transfer by assignment takes place where the transfer is made by a separate writing. The peculiarities of the law governing indorsement do not apply in the case of assignments, and the assignee merely steps into the place of the assignor.²

Title passes by operation of law in the following cases:

(a) "The death of the holder, where the title vests in his personal representative, or

(b) "The bankruptcy of the holder, where the title vests in his assignee, or

(c) "In some jurisdictions, where the holder is an unmarried woman, on her subsequent marriage the title vests in her husband, or

(d) "In some jurisdictions the title to a bill or note transferred to a married woman vests in her husband, or

(e) "Upon the death of a joint payee or indorsee

¹ Norton on Bills and Notes, Sec. 84.

² Littlefield vs. Bank, 97 N. J., 581;

Kleeman vs. Friskie, 63 Ill. 482; Willis vs. Trambly 13 Mass., 204.

the title vests at once in the survivor or survivors.”³

Transfer by indorsement has already been discussed.⁴

A bill or note payable to bearer may be transferred by mere delivery without indorsement.

SECTION 29. VALIDITY OF BILLS OR NOTES BETWEEN IMMEDIATE PARTIES.

As between the immediate parties to any bill or note, any defense can be set up which would invalidate any ordinary contract.

SECTION 30. BONA FIDE PURCHASERS FOR VALUE.

The above rule does not apply in the case of remote parties. A bona fide purchaser for value may hold a bill or note free from a defense which might have been set up against a prior party.

To be a bona fide holder for value, a person must either have given a valuable consideration for the bill or note and taken it without notice of facts which impeach its validity between antecedent parties, or have received the instrument from a bona fide holder. After a bill or note has once passed into the hands of a bona fide holder, it will not become invalidated upon a subsequent transfer merely because the new holder did not give a valuable consideration to such bona fide holder, or had knowledge of facts which would have been a defense between the parties antecedent to the bona fide holder.

SECTION 31. THE VALUABLE CONSIDERATION.

The holder of a bill or note, to take it free from defenses, must have given something of value for it.

³ Norton on Bills and Notes, Sec.

88.

⁴ See Chapter IV.

The exact amount paid is immaterial except as evidence to be considered on the question of good faith.⁶ A note given in payment of a contemporaneously contracted debt is given for a valuable consideration. Where a bill or note is given before its maturity in payment and extinguishment of a pre-existing debt it is generally held to have been transferred for a valuable consideration,⁸ but there are some authorities to the contrary.

"A distinction is sometimes drawn, more especially in New York, between cases where negotiable paper is received in absolute payment and extinguishment of a precedent debt and those wherein it is received in mere nominal or conditional payment, the right of the creditor to proceed upon the original indebtedness after the maturity of the paper remaining unimpaired. In the former case the creditor is unaffected by equities of which he has no notice. In the latter he holds subject to such equities." " " "

When a bill or note is transferred before maturity as collateral security for a debt contemporaneously contracted, the transferee is regarded as a bona fide holder for value,⁹ and is entitled to hold the same even against a subsequent attaching creditor or payee.¹⁰

Where a bill or note is given as collateral security for the existing debt of a third person, there must be a definite agreement for forbearance, or some other circumstance of detriment to the creditor or advantage

⁶ *Swift vs. Tyson*, 16 Pet. (U. S.), 1; *Barnum vs. Barnum*, 8 Conn., 469, 21 Am. Dec., 689.

⁸ *Townsend vs. Samrall*, 2 Pet. (Del.) (U. S.), 170; *Bush vs. Peckard*, 3 Harr (Del.), 385; *Fay vs. Blackstone*, 31 Ill., 538; *Draper vs. Cowles*, 27 Kan., 484.

⁹ *Rosa vs. Brotherson*, 16 Wend. (N. Y.), 77; *Ferris vs. Ravel*, 87 Tenn., 386.

¹⁰ *Am. & Eng. Ency. of Law*, Vol. IV, p. 288.

¹¹ *Exchange Bank vs. Butner*, 60 Ga., 654; *Belmont Branch Bank vs. Hoge*, 35 N. Y., 65.

¹² *Davis vs. Carson*, 69 Mo., 609.

to the debtor, in order to render the creditor a holder for value.¹¹

SECTION 32. NOTICE.

In order to constitute a person a bona fide holder for value, he must in addition to having acted in good faith, and having given a valuable consideration, have taken without notice of the existing defenses.

The notice may be either express or constructive. Constructive notice may arise either from the face of the bill or note, or from extrinsic circumstances. An indorsement, "For the account," of indorser, gives notice of the lack of right of the indorsee to use it for his own purposes,¹² but an indorsement without recourse is not sufficient to put the holder on inquiry as to equities between original parties.¹³

The notice, whether express or constructive, need not particularize the defect; it is sufficient if it is enough to put an ordinary prudent man on his guard.¹⁴

The fact that interest on a bill or note is overdue is not of itself sufficient to constitute notice. A notice to an agent is a notice to his principal in this class of contracts as in others.¹⁵ The holder of a bill or note takes it unaffected by public records not referred to in the instrument.¹⁶

SECTION 33. OVERDUE PAPER.

The doctrine of bona fide holders for value only applies to negotiable instruments before their maturity.

¹¹ *Sumwalt vs. Ridgely*, 20 Md., 107; *Manafeld vs. Corbin*, 2 Cush. (Mass.), 151.

¹² *Trettel vs. Barandon*, 8 Taunt 100; 4 E. C. L., 35.

¹³ *Bisbing vs. Graham*, 14 Pa. St., 56; 14, 53 Am. Dec., 510.

¹⁴ *Whaley vs. Neill*, 44 Mo. App., 316; *Myers vs. Bealer*, 30 Neb., 280.

¹⁵ *Norwegian Plow Co. vs. Munger*, 52 Kan., 37; *Pittsburg Bank vs. Whitehead*, 10 Watts (Pa.), 397.

¹⁶ *Myers vs. Hazard*, 4 McCrary (U. S.), 94; 50 Fed. Rep., 156; *Warren County vs. Marcy*, 97 U. S., 96.

The holder of overdue negotiable paper always takes it subject to all equities existing between the original parties. The mere fact that the bill or note was not paid when due constitutes sufficient notice to put the holder on his guard.¹⁷

¹⁷ Down vs. Halling, 4 B. & C., 330;
10 E. C. L., 347; Morgan vs.
United States, 113 U. S., 476;
Towner vs. McClelland, 110

Ill., 542; Hinckley vs. Union
Pac. R. Co., 129 Mass. 52;
37 Am. Rep., 297.

CHAPTER VII.

PRESENTMENT AND PROTEST.*

SECTION 34. PRESENTMENT IN GENERAL.

There are two presentments to be made by the holder of a bill of exchange, the presentment for acceptance and the presentment for payment. The former is properly made any day before the day of maturity of the bill is reached; the latter, the presentment for payment, is properly made on the day of the maturity of the bill. Where the right of presentment for acceptance is delayed until the day of maturity, then the right to present for acceptance is merged in the right to demand payment. The only presentment to be made of a promissory note is the presentment for payment. Presentment for acceptance and payment is a prerequisite to charge the persons secondarily liable on the bill of exchange, and presentment of a note at maturity for the payment of the same is necessary to charge those secondarily liable on the note.

SECTION 35. ESSENTIALS OF PRESENTMENT FOR ACCEPTANCE.

In connection with the subject of presentment for acceptance it is necessary to consider by whom and to whom presentment should be made; the place of presentment; and the manner of presentment; the time of presentment; and when presentment would be necessary. It may be said, then, that presentment should be made by the holder in person or by his duly authorized agent. The presentment should be made

* Chapter VII is written by Shelley B. Neltner.

to the drawee or his duly authorized agent. A bill drawn against a partnership firm may be presented to any one of the partners, but a bill drawn against several persons not doing business as partners should be presented to them all, but if the first person to whom it is presented refuses to accept, this would render the acceptance by the other of no avail; so it would seem that the dishonor by the first presentment and demand would give the holder the right to treat it as a dishonor.¹ Where the presentment and demand are made to the agent of the drawee care should be exercised by the drawer in determining whether the agent's authority extends to the acceptance or non-acceptance of the paper.

As to place of presentment for acceptance; it may be made either at the drawee's place of business, if he has a place of business, or at his domicile. As to the manner of presentment, it may be said the holder on making presentment should have the bill in his possession and should exhibit it and should demand the acceptance of the same.² This is only fair to the drawee, as he may then determine whether under the circumstances of the matter he will choose to elect to accept or not to accept the paper as drawn. If, however, the drawee does not ask to see the bill, a failure to exhibit it would not on that account discharge the drawer and indorsers on the bill having been protested for dishonor.³

When a bill is made payable at a stated number of days after sight, or at sight, it should be presented within a reasonable time or without unreasonable delay. A bill of exchange payable on demand does not require

¹ Story on Bills and Notes, Sec. 229.

² Fall River Union Bank vs. Willard, 5 Metc., 216.

³ Fisher vs. Beckwith, 19 Vt., 31.

presentment for acceptance.⁴ Presentment for acceptance should be made when presented at the place of business of the drawee during business hours. Presentment at a bank should be during banking hours. If presentment is made at the house, then a presentment made any time before bed time, the hour of retiring, is good.⁵

The hour of presentment is only material where no answer is received. If an answer is actually received at any hour, the presentment will then be good.⁶

Bills payable on demand, or those instruments which are made payable a number of days after date, or bills payable on a day certain, need not be presented for acceptance; a presentment for payment alone is required.⁷

It is, however, the better practice to present a bill for acceptance even though it is payable at a future day certain, as in this way it can be easily ascertained whether it will be honored, and also to secure the acceptor's liability.⁸

SECTION 36. PRESENTMENT FOR PAYMENT.

Anyone who is a bona fide holder of a promissory note, or a bill of exchange, may present it for payment on the maturity of the paper. But the possession of paper by one person which is unindorsed, where it is made payable to the order of another, would not give the holder a right to demand payment as a bona fide holder.⁹

Where the holder can, however, show by extraneous evidence his ownership of the paper, as for instance

⁴ Townsley vs. Sumrall, 2 Pet., 170.

⁵ Skelton vs. Dustin, 92 Ill., 49.

⁶ Story on Bills, Sec. 237.

⁷ Batchellor vs. Priest, 12 Pick., 399.

⁸ Daniels on Negotiable Instruments, Vol. 1, Sec. 454.

⁹ Doubleday vs. Kress, 60 N. Y., 413; Barnett vs. Ringgold, 80 Ky., 289.

an assignment of the paper, he may demand payment of the same and the person to whom it was presented could not insist on the indorsement.¹⁰

Where the ownership of the paper passes to the administrator by the death of the owner the administrator properly makes his presentment; so on the bankruptcy of the holder his assignee takes his place for the purpose of demanding payment of the paper.¹¹

SECTION 37. WHEN THE MAKER OF A NOTE OR AN ACCEPTOR OF A BILL IS DEAD.

When the person primarily liable on a note or bill is dead, as the maker of a note, or the acceptor of a bill, then presentment for payment should be made to the personal representative of deceased maker or acceptor, if there is a personal representative appointed; if not, then presentment should be made at the place where the paper was payable if a place is mentioned, otherwise presentment should be made at the domicile of the deceased.¹² Where the persons primarily liable are partners and one of the partners is dead, then presentment should be made to the surviving partner.¹³

A person making a presentment for payment should exercise due diligence in any event, and he should endeavor not to time his presentment so as to make it impossible for the one to whom presentment is made to meet the payment, nor should he manage the presentment so as to take the maker or acceptor off his guard. Presentment at an improper place or at an improper time would be a nullity.¹⁴ Where presentment is fixed at a particular place, it need not then

¹⁰ Pease vs. Warren, 25 Mich., 9.

¹¹ 1 Parsons, N. & B., 360.

¹² Story on Notes, Sec. 253.

¹³ Cayuga County Bank vs. Hunt, 2 Hill, 635.

¹⁴ Johnson vs. Haight, 13 Johns., 470.

be a personal presentment on the maker or acceptor; presentment at the place named is sufficient. A demand of payment is a usual essential where the paper is payable generally, but this would be unnecessary where a demand would be impracticable or impossible; as, for instance, where the maker or acceptor has absconded, or in case where he has no known place of residence.¹⁵

SECTION 38. EFFECT OF FAILURE TO PRESENT A BILL OR NOTE FOR PAYMENT.

Briefly it may be stated that a failure to present a promissory note or a bill of exchange for payment at the proper place on the day of maturity will discharge the persons secondarily liable on the paper, and will further relieve the maker or acceptor from the liability of payment of further interest on the paper, if the maker or acceptor was prepared and stood ready to meet the paper according to the terms of the same, as stipulated in the note or bill. The maker or acceptor would not, however, be relieved from liability to pay the principal sum named in the note or bill. As to the principal sum, the maker and acceptor continue to be liable at all times and everywhere for its payment within the period of the statute of limitations. The instituting of a suit against the maker or acceptor is sufficient demand as to them.¹⁶ So far as the drawer of a bill or the indorser of a note or bill is concerned, the holder is held to the strictest liability in the matter of presenting the paper on the day of maturity and complying with the other terms of the note or bill.¹⁷

¹⁵ Whittier vs. Graffam, 3 Greenl. 82.

¹⁶ Jackson vs. Packer, 13 Conn. 342.

¹⁷ Johnson vs. Haight, 13 Johns. 470.

SECTION 39. NOTICE OF DISHONOR.

If the holder of the negotiable paper has presented the same for payment, and it has been dishonored, the duty is then on the holder to give notice of the dishonor to those who are secondarily liable on the paper, that is to the drawer and indorser of a bill and the indorsers of a note. A failure to give this notice will discharge the drawer or the indorser as the case may be. Persons secondarily liable on the paper are entitled to this notice at once, in order that they may take steps towards protecting their own interests in the premises.¹⁸ But the principal reason for the rule is the condition that the rule of the Law Merchant itself imposed, namely, a compliance with the conditions precedent of presentment and notice in order to bind the indorser or the person whose liability is secondary.¹⁹

The holder's failure to give this notice of the non-payment of the bill or note fails then to perform the condition precedent to his right to recover; he cannot, therefore, bring suit against those who become parties to the paper, relying on the right of performance of these conditions precedent. It is, therefore, the rule that the drawer or indorser who has not been sent the notice of dishonor may not only claim a discharge on his liability on the note, but also on the liability upon the consideration of the transfer of the paper.²⁰

SECTION 40. HOW THE NOTICE SHOULD BE GIVEN.

The notice may be given either orally or in writing and should be given to any person upon whom the holder wishes to fix a liability; he may, therefore, notice

¹⁸ *Stewart vs. Millard*, 7 Lans., 373.
¹⁹ *Musson vs. Lake*, 4 How. (U. S.),
262.

²⁰ *Woodcock vs. Bennett*, 1 Cow.,
711.

all or anyone of the indorsers. The notice must be dispatched within twenty-four hours after the dishonor of the paper where the parties reside in different places. A personal notice must be given either in writing or verbally where the parties reside in the same place.²¹

SECTION 41. WHAT THE NOTICE SHOULD CONTAIN.

Where the notice is oral or written, it should be sufficient to apprise the person to be charged of the default in payment of the particular paper in question. Where the notice is given verbally less particularity of identification is required, because the person upon whom the liability is to be fixed is at hand to put such questions touching the paper in question as he saw fit. But where the notice is written, the paper in question should be sufficiently described to identify it. It should state that the paper was presented for payment; that a demand of payment was made; that it was dishonored; and the notice must state further that the holder looks to the person notified for payment of the paper. A true copy of the note in question may properly be attached to the notice, although this is not necessary to the validity of the notice.²² No particular form of notice is required.²³

SECTION 42. PROTEST.

A foreign bill of exchange that has been dishonored must be regularly protested as a preliminary to the sending out of the notice of dishonor; therefore its presentment must be made by one who is a notary public, as the certificate of the protest of the notary is recognized as satisfactory proof of the statements that

²¹ *Merritt vs. Woodbury*, 14 Iowa, 290.

²² *Cook vs. Litchfield*, 9 N. Y., 279.
²³ *Raaber vs. Kieran*, 4 Camp., 87.

the certificate should properly contain, and the act of the notary in so acting is universally recognized.²⁴ Where a foreign note has been indorsed, the protest of the note by a notary is necessary, according to the weight of authority.²⁵ An inland bill or note, unindorsed, need not be protested by a notary, but the statutes, however, permit the notary public to protest the inland bill and note, after the same fashion as in writing up his certificate of protest on a foreign bill. It is a common custom, therefore, of banks and other handlers of negotiable paper to employ a notary public as their agent to act in the particular of presenting negotiable paper and where it is dishonored of protesting and sending out the notice of dishonor to persons secondarily liable. The employment of a notary in such a case, while sanctioned, is not made necessary; it is done as a matter of convenience. Nor is it necessary that the notice of dishonor be sent out by the notary, although this is customarily a part of the duties of his office by the private arrangement of his employers.²⁶ The notary's certificate contains his declaration in formal language, usually, and under a written copy of the note or bill in question stating that he has made presentment and demand of payment, and that the payment has been refused, together with the reasons for the refusal, time, and the fact that he therefore protests the paper. The notary then attaches his seal of office to the certificate of protest and signs the same. The main purpose served by the certificate is to afford to the holder the legal testimony on the facts properly contained therein, in an action on the paper against those secondarily liable.²⁷

²⁴ *Halliday vs. McDougall*, 20 Wend., 80.

²⁵ *Ticonic Bank vs. Stockpole*, 41 Me., 302.

²⁶ *Bailey vs. Dosier*, 6 How., 2.

²⁷ *Walker vs. Twines*, 2 Gratt., 536.

SECTION 43. EXCUSES FOR FAILURE TO PRESENT OR TO GIVE NOTICE.

While it is a strict rule of law that a note or bill must be presented for payment on the day of maturity, and while the law will also demand that the rules of notice or dishonor and protest be rigidly enforced, yet where impossibilities arise which prevent the holder from making the presentment and protest and sending out notice of dishonor, the law will excuse the holder from performing these obligations while the impossibility exists which prevent the accomplishment of these duties; and notwithstanding the presentment and protest is not made, and the notice is not given, the law will in such cases hold the drawer and the indorsers liable.

Among the most usual things that may occur that would act as an obstacle to presentment and protest may be mentioned the breaking out of hostilities between the country of the holder and the country of the person upon whom presentment, etc., is to be made; as long as the war continues, or until communication between the affected countries is resumed, the war will operate as an excuse to delay presentment and protest and notice.²⁸

So the happening of any event that would cause a complete cessation of business between the place of business of the holder and the place of business of the person upon whom presentment is to be made or notice given would excuse the holder pending the continuation of such happening. It is necessary, however, that business be completely suspended by the disturbance and that the suspension be necessary on account of the happening. Disturbances of this sort

²⁸ *Hubbard vs. Mathews*, 54 N. Y., 43.

include conflagrations, epidemics, riots, floods, and a general pestilence.

It is the further rule that with the cessation of the calamity, or the removal of the bar to presentment, etc., that it is then the duty of the holder to make presentment and protest, and send out notice of dishonor, within a reasonable time after the removal of the cause of the delay.²⁰

If an indorser indorses a void note, he is liable on his implied guaranty and cannot escape liability for lack of presentment, protest and notice, as he cannot expect that the note will be honored under such circumstances.²⁰ If the address of the maker of a note is unknown and cannot be found out by the exercise of due diligence, or the same is true as to the acceptor of a bill, presentment will be excused and the paper may be protested and notice sent out to the indorsers or the drawer.

Presentment is likewise excused by the notorious insolvency of the maker, or acceptor, or if the maker or acceptor has absconded, no presentment need be made.

The extreme illness, or the death of holder on the eve of presentment, will operate to furnish a temporary excuse for failure to make presentment. But it must be remembered that this last excuse is only to be temporarily claimed, and that within a reasonable time the representative of the holder should act in his stead.²¹

Presentment, protest, and notice may be waived; but the waiver must be made by the indorser or the person secondarily liable on the paper to the holder of

²⁰ Bond vs. Moore, 93 U. S., 593.

²⁰ Wyman vs. Adams, 12 Cush., 310.

²¹ White vs. Stoddard, 11 Gray, 258.

the paper.²² It is not necessary that the waiver be written on the note or bill itself; it may be on a separate piece of paper.²³ A parol waiver is held good by some courts.

²² *Curtiss vs. Martin*, 20 Ill. 557.

²³ *Spencer vs. Harvey*, 17 Wend., 489.

CHAPTER VIII.

DEFENSES TO BILLS AND NOTES.

SECTION 44. CLASSIFICATION OF DEFENSES.

"The defenses interposed by a party to a bill or note in a suit brought by a holder against him are commonly of two classes:

(a) **REAL**—or those which grow out of some defect inherent in the instrument itself.

(b) **PERSONAL**—or those which grow out of acts which between privy parties would invalidate the transfer or prevent the enforcement of the instrument, but which do not attach to or invalidate the instrument."¹

SECTION 45. INCAPACITY OF DEFENDANT TO MAKE THE INSTRUMENT.

The general principle is that the incapacity of the defendant to make the instrument is a real defense, and consequently that it can be successfully maintained even against a bona fide holder for value. At the common law the note of a married woman was void. The same is true of the note of a person who has been adjudged insane.² Before such adjudication, however, such a note is valid in the hands of a bona fide holder for value, and perhaps even in the hands of the first taker, if the contract was a fair one and the person dealing with the lunatic had no knowledge of his incapacity.³

¹ This is the classification of Professor Ames (2 Ames' Bills and Notes, p. 866), and the one which has been generally adopted by recent writers. See Norton on Bills and Notes, p. 206.

² *Fitchburg vs. Wilcox*, 12 Barb., 236.

³ *Mutual Life Ins. vs. Hunt*, 79 N. Y., 541. "If no inquiry has been found, the validity of the bill or note or indorsement depends, first, up-

The negotiable instruments of an infant are not void, but voidable. It is sometimes said that an infant is bound on a note given in payment for necessary. A more correct statement would probably be that the infant is bound for the reasonable value of the goods for which the note is given. The infant's right to disaffirm his note exists even against a bona fide holder for value.⁴

"The bill or note of a corporation and its indorsement thereon is unenforceable except as against a bona fide holder, unless made, given or indorsed for the purposes of its incorporation.

"An indorsement of a corporation transfers title; but except when made for the purposes of its incorporation, and as against a bona fide holder, it subjects the corporation to no liability as an indorser."⁵

SECTION 46. BILLS AND NOTES DECLARED VOID BY STATUTE.

In some cases bills and notes are declared void by statute. An illustration of such a prohibition

on the degree of understanding possessed by the party sought to be charged. A man of weak mind, if not a lunatic or a fool, can contract. An epileptic or enfeebled mind has been held competent to convey property. A person born deaf and dumb is not necessarily an idiot. And no mere want of business capacity, nor even monomania, will in the absence of fraud prevent a party from being bound upon a bill, note or indorsement. The mental incompetency to avoid such a contract must amount to inability to understand the nature of the contract, and to appreciate its probable consequences; and this only, upon being established, will be allow-

ed as a defense. But, once established, the question of the binding liability of this contract depends upon the fact whether the party dealing with him knew or did not know that he was dealing with a lunatic. In the absence of anything being shown upon the subject, the courts lean to the presumption that the party had this knowledge. And if he possess such knowledge then the bill, note or indorsement as between the parties is void, and will not be enforced.⁶ Norton on Bills and Notes, Sec. 98.

⁴ Howard vs. Simpkins, 70 Ga., 322.

⁵ Norton on Bills and Notes, Sec. 96.

is found in the statute of 9 Anne, Chap. 14, Sec. 1, which provided that "all notes, where the whole or any part of the consideration is money knowingly lent for gaming, shall be void to all intents and purposes whatever."

The most common illustrations of this class of statutory provisions at the present time are those relating to usurious negotiable instruments.*

A note declared void by statute cannot be recovered on, even by a bona fide holder for value.⁷ This rule does not apply, however, when the statute merely declares the consideration to be illegal.⁸

SECTION 47. FORGERY AND ALTERATION OF INSTRUMENT.

A forged instrument, not being the contract of the party alleged to have made it, can, of course, confer no rights upon any person, with the single exception that the alleged maker may become liable to a bona fide holder through the application of the doctrine of estoppel.

The material alteration, whether made with fraudulent intent or not, of a negotiable instrument destroys the identity of the contract, and releases any party thereto who does not consent to such alteration.⁹

An immaterial alteration, i. e., one which does not change the tenor of the instrument, does not avoid it.

SECTION 48. FRAUD AND DURESS.

Fraud and duress are both personal defenses to a bill or note and cannot be set up against bona fide

* See Statutes of several States.

⁷ Bowyer vs. Bampton, 2 Strange, 1155.

⁸ Rockwell vs. Charles, 2 Hill (N. Y.), 499.

⁹ Wood vs. Steele, 6 Wall., 80; Booth vs. Powers, 56 N. Y., 22.

holders for value.¹⁰ In the case of *Valentine vs. Lunt*,¹¹ the Court said on this point:

"It is not suggested in any way that the defendant Austin has been guilty of any fraud, or unfair practice, or want of care leading to the commission of fraud by Richardt; on the contrary, both Mrs. Austin and Mrs. Lunt are declared to be wholly innocent in the matter; yet the general claim of the respondent is that, inasmuch as the deed to Richardt should be declared invalid, because of the advantage taken by him, as if it concerned himself alone, the subsequent conveyance to Austin, and her mortgage to Lunt, must be canceled. All this seems contrary to natural justice and reason, and it is opposed, we think, to those rules and principles of established equity by which courts are governed in cases of this nature. It certainly is not a matter of course for a court of equity to set aside and declare a conveyance so obtained to be void, and transactions depending upon it invalid. When its jurisdiction is invoked for that purpose it applies the maxim that he who seeks equity must do equity. In the case before us the money was loaned by Mrs. Lunt on the faith and credit of a title, ownership, and possession which the grantor had conferred upon the mortgagor. As against the defendant, therefore, an innocent and bona fide mortgagee, she is estopped from denying that the apparent title was not the real and true title. The mortgage is good upon its face. The records and the possession of the property by the mortgagor show that she had a right to execute it, and that is enough in the first instance to establish its validity. To show its invalidity the plaintiff sets up collateral

¹⁰ *Simpson vs. DeHoyo*. 94 N. Y.,
189.

¹¹ 115 N. Y., 496; 22 N. E., 209.

matter nowhere appearing of record, or to have been brought to the attention of the mortgagee. It is unavailing. The deed from the plaintiff's ancestor conveyed an estate in fee-simple to her grantee, and when recorded, it was, to all persons acquiring rights under it, clothed with all the guaranties which the law can bestow. It was transferable by deed, and the purchaser acquired all the rights of an owner. He might again sell or mortgage it, and, to one receiving it as purchaser, or as security without knowledge of any secret fraud, it was free from any taint which, as between the original parties, might have infected their transaction. Whatever might be their guilt or condition, a court of equity will not visit its consequences upon him. 'The law,' says Chief Justice Kent, 'has always had a regard to derivative titles when fairly procured, and though it may be true, as an abstract principle, that a derivative title cannot be better than that from which it was derived, yet there are many necessary exceptions to the operation of this principle.' *Jackson vs. Henry*, 10 Johns, 184. In the case of fraudulent conveyances which the statute declares to be 'utterly void,' it has been well settled 'that a purchaser for a valuable consideration, without notice, has a good title, though he purchases from one who has obtained his title by fraud.' *Id.* 'He may not only convey the property, but he may deal with it as owner, and may mortgage it, and whoever purchases the property, or takes a mortgage thereon from him, or under him, in good faith, for value, or deals with him in good faith in reference thereto, will be protected against the claims of the defrauded vendor.' In *Miller vs. Zeimer*, 111 N. Y., 441; 18 N. E. Rep., 716, cited by the respondent, the purchaser of a mortgage

was allowed to recover the amount actually paid by him, although the mortgage was, as between the parties, usurious, and therefore, by the statute, absolutely void. But the purchaser had taken the security on the representations of the mortgagor as to its validity, and he was held to be estopped from setting up the defense. So far as this case has any application, it favors the defendant, for it shows that one acting in good faith will be protected, although the mortgage is, by the literal terms of the statute, invalid.

"The other cases cited by the learned counsel for the plaintiff do not require a different judgment in this case. So far as they are from the courts of this state, and are at all pertinent, they are *Riggs vs. Society*, 84 N. Y., 330; 95 N. Y., 503; *Fisher vs. Bishop*, 108 N. Y., 25; 15 N. E. Rep., 331; *Van Deusen vs. Sweet*, 51 N. Y., 382. In *Riggs vs. Society*, upon each presentation it was brought before the court by the defendant, who had induced a gift or contract from one known to be under a delusion. In *Fisher vs. Bishop*, the action was in equity to cancel a bond and mortgage procured by fraud and undue influence practiced by the defendant, who had induced the plaintiff, by its execution, to secure a debt due from another person, but for which the mortgagor was in no sense responsible. The plaintiff succeeded at special term (36 Hun., 112), but upon appeal the judgment was modified by requiring the plaintiff to repay to the defendant the sum of one dollar, which it appeared had been actually paid by him as a consideration. *Van Deusen vs. Sweet* was an action to recover possession of real property, both parties claiming under a common source of title—the plaintiff under

his father's will; the defendant as tenant of the plaintiff's brother, who claimed under a deed from the same father. No equitable relief was sought, and the terms on which such relief might, if at all, be given, was not the subject of the consideration. Some other cases have been cited involving the rights of an assignee of a non-negotiable chose in action, as *Barry vs. Assurance Co.*, 59 N. Y., 587; *Loomis vs. Ruck*, 56 N. Y., 462. They have no application. Such an assignee stands in the place of his assignor, and is in no better position; he is put upon inquiry, and is affected by all the rights and equities of the original owner, and, indeed, he must always abide the case of the person from whom he buys. In the case before us, if it be assumed that, as between Richardt and the plaintiff, the deed of Mrs. Valentine was void, because obtained by some undue influence, or fraud, or by advantage taken of her condition, the title of Mrs. Austin to the property would be still good. If there be any concealed defect arising from the conduct of those who had held the property before she acquired it, of which she had no notice, that defect cannot prevail against her. *Simpson vs. Del Hoyo*, 94 N. Y., 193. She is conceded to have been a purchaser for a valuable and full consideration, without notice of any fraud vitiating the title of Richardt, and it necessarily follows that the defendant Lunt, who in perfect good faith, in actual ignorance of any fraud or circumstances tending to show fraud on the part of anyone connected with the title, advanced her money in reliance upon the record title, and possession corresponding to that title, should not be required to give up her mortgage security except upon payment. This the plaintiff does not propose to make. If the deed to

Richardt is, as the plaintiff contends, absolutely void, this action was unnecessary. If it was necessary, then the plaintiff must submit to rules by which courts of equity are guided. The judgments of the special and general terms do not conform to them. They should therefore be reversed, and the demurrer overruled, with costs in all courts to the defendant Lunt. All concur."

What will constitute fraud and duress has already been discussed under the subjects of contracts¹² and torts,¹³ and the same principles will apply in determining whether a bill or note has been obtained by fraud or duress.

SECTION 49. FAILURE OF CONSIDERATION.

A negotiable instrument, like all other contracts, requires a consideration to support it. A consideration is presumed in the case of a negotiable instrument, but such presumption may be rebutted. Want, failure, or illegality of considerations are defenses between immediate parties, and a partial failure of consideration is a defense against an action brought by a bona fide holder for value.¹⁴

SECTION 50. PAYMENT AND DISCHARGE OF INSTRUMENT.

The payment of a negotiable instrument will always be a good defense between the immediate parties; before maturity, however, it will not be a defense against a purchaser for value who takes without notice of such payment. A payment of a note by an indorser will not extinguish the debt of the maker,

¹² Vol. III, Sub. 6.

¹³ Vol. IV, Sub. 8.

¹⁴ Davis vs. McCready, 17 N. Y., 230.

unless the payment was made with this intention. The rules governing the rights of bona fide holders for value do not generally apply in the case of discharge by operation of law.

CHAPTER IX.

CHECKS.

SECTION 51. DEFINITION.

"A check is a draft or order on a bank or banker, purporting to be drawn on a deposit of funds, for the payment, at all events, of a certain sum of money to a certain person therein named, or to him or his order, or to bearer, and payable instantly on demand."¹

SECTION 52. NEGOTIABILITY.

A check is not strictly a bill of exchange,² but closely resembles an inland bill of exchange, payable on demand. It is governed by the same rules in relation to transfer, indorsement and negotiability.³ To be negotiable, however, a check must be in the form of a negotiable instrument; a check payable on a contingency is not negotiable.

SECTION 53. LIABILITY OF BANKS.

A check gives the payee no rights against the bank upon which it is drawn. The bank is under no liability to the payee for refusing to pay the check, even when the bank holds funds of the maker. In such a case the payee has a right of action against the

¹ Norton on Bills and Notes, Sec. 148.

² "In a sense, undoubtedly, a check is a species of bill of exchange, and in a sense, also, it is a distinct commercial instrument; but according to the understanding of merchants, and according to our statutes, these instruments were checks and not bills of exchange. A check is an order to pay the

holder a sum of money at the bank, on the presentment of the check and demand of the money. No previous notice is necessary; no acceptance is required or expected; it has no days of grace. It is payable on presentment, and not before." Norton on Bills and Notes, page 384, note.

³ Keene vs. Bland, 8 C. B. (N. S.), 380.

maker, and the maker a right of action against the bank.

"By certifying a check to be good, the bank assumes an unconditional obligation to the holder presenting it, and to every subsequent holder, to pay it on demand; and this obligation may be enforced by the holder against the bank. And a delay in presentment will not discharge the obligation.

"The certification of a check at the instance of the holder discharges the drawer and indorsers from liability, but the drawer is not discharged where he himself has it certified, and puts it in circulation. The drawer will also be discharged if the holder takes the parol acceptance of the bank instead of payment."*

SECTION 54. PRESENTMENT, PROTEST AND NOTICE AS TO CHECKS.

In general, the rules in force as to presentment, notice and protest of checks are the same as in the case of bills of exchange and promissory notes.⁶ But there is in this connection, this distinction between a check and a bill of exchange: the want of due presentment or notice of dishonor of a check does not discharge the drawer unless he has suffered some loss or injury thereby.⁶ It may be said further, that a holder of a check cannot by his mere act of delay lose his right of recourse on the drawer; still it is his duty to present the check for payment within a reasonable time and give notice to the drawer within a like reasonable length of time if it is dishonored, and if he fails to do so, the delay is at his peril.⁷

* Norton on Bills and Notes, Secs. 156-157.

* Merchants Bank vs. State, 10 Wall., 496.

* Heartt vs. Rhodes, 66 Ill., 357.

* Stevens vs. Park, 73 Ill., 387.

The holder by his omission to make presentment, protest and notice assumes the burden of showing that the failure to obtain payment of the check was through no fault of his, and necessarily that no damage had occurred to the drawer by his delay.⁸

In case the bank on which the check is drawn fails, after the check has been delivered to the holder, and after he has held it and has not presented it within a reasonable length of time, if the drawer of the check had sufficient funds in bank to meet the check, the fault of failing to obtain payment is on the holder of the check. But if the bank has not failed the drawer cannot claim a discharge because the holder has merely delayed presenting the check to the bank for payment.⁹

As to the question, as to what constitutes a reasonable length of time, that the holder may take to make presentment of a check, or to pass it by transfer to another, so that the peril of the failure of the bank on which the check is drawn shall not be assumed by the holder, the law has declared that time to be only twenty-four hours after the holder has received the check. The holding of the check, therefore, for more than one day, it has repeatedly been held, discharges the drawer, in case the bank on which the check is drawn fails in the meantime.¹⁰

But the rule as stated will not be permitted to work too great a hardship on the holder, and a further interpretation of the rule gives the holder of a check who receives it at a point more or less remote from the bank on which it is drawn the whole of the day follow-

⁸ *Moyt vs. Seeley*, 18 Conn., 353;
 Daniels vs. Kyle, 1 Ga., 304.
⁹ *Mohawk Bank vs. Broderick*, 10
 Wend., 309.

¹⁰ *Bickford vs. First National Bank*,
 42 Ill., 238.

ing the day of receipt in which to forward the check to the bank on which it is drawn for presentment. The time consumed in the process of forwarding the check from the place of the holder to the bank may be a week or more, and any loss occurring by reason of failure of bank during this period would not fall on the holder.¹¹ The payee of a check has the alternative right to present it to the bank, or start the forwarding of it within twenty-four hours, or he may transfer it by indorsement or delivery within twenty-four hours from the time of receipt to another holder, who in turn has the same right. But it may be said, generally, that a check is not intended for general circulation like a note or bill; it is meant for immediate presentment.¹² It may be said, generally, that those things that will excuse a failure to present a bill or note and to protest and give notice on the same will likewise operate an excuse for presentment of a check. The insolvency of the bank will, of course, excuse presentment.

¹¹ Smith vs. Jones, 20 Wend., 192.

¹² Mohawk Bank vs. Broderick, 10 Wend., 304.

CHAPTER X.

THE UNIFORM NEGOTIABLE INSTRUMENT LAW.

SECTION 55. HISTORY OF THE ACT.

The following history of the Uniform Negotiable Instrument Law is taken from Street's Foundation of Legal Liability:¹

"Judge M. D. Chalmers published his Digest of the English Law of Bills, Notes and Cheques in 1878. In form it was modeled after the Indian Codes. In substance it was a statement, in succinct and orderly paragraphs, of the results of the decided cases. The general propositions were framed by the author and illustrated, so far as practicable, by reference to actual decisions. The writer, however, in order to complete the symmetry of his work did not confine himself to the binding decisions of the English courts, but, where there was no expression from that source on a particular point, consulted the decisions of foreign tribunals and the works of foreign jurists, as well as usages of merchants and bankers.

"The skill with which Judge Chalmers performed his task attracted much favorable notice, and accordingly soon afterwards the Institute of Bankers and Associated Chambers of Commerce procured his services in framing a bill. In doing this, he strove to reproduce, as exactly as possible, the existing law, whether it seemed good, bad, or indifferent in its effect. The bill was then introduced in Parliament, and was passed after certain amendments had been

¹ Vol. II, pages 495-6.

incorporated, on the advice of a select committee of merchants, bankers, and lawyers, to whom the bill was referred.

"The English Bills of Exchange Act (1882), is, therefore, substantially, a codification of existing law. It has given great satisfaction in England and in her self-governing colonies, in all of which it has been adopted. The very small number of cases involving bills and notes, which have reached the higher courts since its passage, show that the act has contributed much to the removal of doubt and controversy.

"The favor with which this piece of parliamentary legislation was received in England stimulated efforts to the same end in America, and in 1895 the American Commissioners on the Uniformity of Legislation, instructed their Committee on Commercial Law to have the American Laws of Bills and Notes put into the form of a code. The matter was referred to a sub-committee composed of Messrs. Lyman D. Brewster, Henry C. Wilcox, and Frank Bergen. These gentlemen procured Mr. J. J. Crawford of New York City to draft the law. The result of his labor was submitted to the commissioners at Saratoga in 1896. They carefully went over the bill and made a few changes, chiefly such as the draftsman had not felt at liberty, on his own authority, to make. As thus amended, the draft was approved by the conference and submitted to the legislatures of a number of the states. New York first enacted it into law, and more than twenty of the American states have since followed this example."

The law has been adopted literally in some of the states, but in others, as in Illinois, some provisions have been materially changed. In the following

articles the text of the original act is given in full, the changes in the Illinois statutes, in addition, being inserted in brackets.

UNIFORM NEGOTIABLE INSTRUMENTS ACT.

ARTICLE I.—FORM AND INTERPRETATION.

[NEGOTIABLE INSTRUMENT MUST CONFORM TO WHAT REQUIREMENTS.] § 1. An instrument payable in money, to be negotiated, must conform to the following requirements:

1. It must be in writing and signed by the maker or drawer.

2. Must contain an unconditional promise or order to pay a sum certain in money.

3. Must be payable on demand or at a fixed or determinable future time.

4. Must be payable to order or to bearer, and,

(4. Must be payable to the order of a specified person or to bearer; and,)

5. Where the instrument is addressed to a drawee, he must be named or otherwise indicated therein with reasonable certainty.

[SUM PAYABLE WITHIN THE ACT.] § 2. The sum payable is a sum certain within the meaning of this act, although it is to be paid:

1. With interest; or

2. By stated installments; or

3. By stated installments, with a provision that upon default in payment of any installment, or of interest, the whole shall become due; or

4. With exchange, whether at a fixed rate or at the current rate; or

5. With costs of collection or an attorney's fee, in case payment shall not be made at maturity.

[PROMISE TO PAY—UNCONDITIONAL—WHAT CONSTITUTES.] § 3. An unqualified order or promise to pay is unconditional within the meaning of this act, though coupled with:

1. An indication of a particular fund out of which reimbursement is to be made, or a particular account to be debited with the amount; or

2. A statement of the transaction which gives rise to the instrument.

But an order or promise to pay out of a particular fund is not unconditional.

[TIME PAYABLE.] § 4. An instrument is payable at a determinable future time, within the meaning of this act, which is expressed to be payable:

1. At a fixed period after date or sight; or

2. On or before a fixed or determinable future time specified therein; or

3. On or at a fixed period after the occurrence of a specified event, which is certain to happen, though the time of happening be uncertain.

An instrument payable upon a contingency is not negotiable, and the happening of the event does not cure the defect.

[NEGOTIABILITY—AFFECTED BY INCLUDING ACT ADDITIONAL TO PAYMENT.] § 5. An instrument which contains an order or promise to do an act in addition to the payment of money is not negotiable under this act. But the negotiable character of an instrument otherwise negotiable is not affected by a provision which:

1. Authorizes the sale of collateral securities in case the instrument be not paid at maturity; or

2. Authorizes a confession of judgment if the instrument be not paid at maturity; or

(2. Authorizes a confession of judgment; or)

3. Waives the benefit of any law intended for the advantage or protection of the *obligor*; or

(3. Waives the benefit of any law intended for the advantage or protection of the obligator; or)

4. Gives the holder an election to require something to be done in lieu of payment of money.

But nothing in this section shall validate any provision or stipulation otherwise illegal or authorize the waiver of exemptions from execution.

[VALIDITY AND NEGOTIABILITY, HOW NOT AFFECTED.] § 6. The validity and negotiable character of an instrument are not affected by the fact that:

1. It is not dated; or

2. Does not specify the value given, or that any value has been given therefor; or

3. Does not specify the place where it is drawn or the place where it is payable; or

4. Bears a seal; or

5. Designates a particular kind of current money in which payment is to be made.

(5. Is payable in currency or current funds; or designates a particular kind of current money in which payment is to be made.)

[PAYABLE ON DEMAND.] § 7. An instrument is payable on demand:

1. Where it is expressed to be payable on demand, or at sight, or on presentation; or

2. In which no time for payment is expressed.

Where an instrument is issued, accepted or indorsed when over due, it is, as regards the person so issuing, accepting or indorsing it, payable on demand.

[PAYABLE TO ORDER.] § 8. The instrument is payable to order where it is drawn payable to the order of a specified person or to him or his order. It may be drawn payable to the order of:

1. A payee who is not maker, drawer or drawee;
or
2. The drawer or maker; or
3. The drawee; or
4. Two or more payees jointly; or
5. One or *some* of several payees; or
(5. One or more of several payees; or)
6. The holder of an office for the time being.
7. An instrument payable to the estate of a deceased person shall be deemed payable to the order of the administrator or executor of his estate.

Where the instrument is payable to order, the payee must be named or otherwise indicated therein with reasonable certainty.

[PAYABLE TO BEARER.] § 9. The instrument is payable to bearer:

1. When it is expressed to be so payable; or
2. When it is payable to a person named therein or bearer; or
3. When it is payable to the order of a fictitious or non-existing person, and such fact was known to the person making it so payable; or
(3. When it is payable to the order of a person known by the drawer or maker to be fictitious or non-existent or of a living person not intended to have any interest in it; or)
4. When the name of the payee does not purport to be the name of any person; or
5. When the only or last endorsement is an endorsement in blank.

(5. When although originally payable to order, it is indorsed in blank by the payee or a subsequent endorsee.)

[NEED NOT FOLLOW WORDS OF STATUTE.]

§ 10. The negotiable instrument need not follow the language of this act, but any terms are sufficient which clearly indicate an intention to conform to the requirements thereof.

[DATE DEEMED DATE.] § 11. When the instrument or an acceptance or any indorsement thereon is dated, such date is deemed *prima facie* to be the true date of the making, drawing, acceptance or indorsement, as the case may be.

[ANTEDATED, OR POST-DATED INSTRUMENT TAKES EFFECT FROM DELIVERY.] § 12. The instrument is not invalid for the reason only that it is antedated or post-dated, provided this is not done for an illegal or fraudulent purpose. The person to whom an instrument so dated is delivered acquires the title thereto as of the date of delivery.

[UNDATED—ANY HOLDER MAY INSERT DATE.]

§ 13. When an instrument expressed to be payable at a fixed period after date is issued undated, or where the acceptance of an instrument payable at a fixed period after sight is undated, any holder may insert therein the true date of issue or acceptance, and the instrument shall be payable accordingly. The insertion of a wrong date does not avoid the instrument in the hands of a subsequent holder in due course, but as to him, the date so inserted is to be regarded as the true date.

[SIGNED IN BLANK, MAY BE FILLED BY HOLDER AFTER DELIVERY.] § 14. Where the instrument is wanting in any material particular, the person

in possession thereof has a *prima facie* authority to complete it by filling up the blanks therein. And a signature on a blank paper delivered by the person making the signature in order that the paper may be converted into a negotiable instrument operates as a *prima facie* authority to fill it up as such for any amount. In order, however, that any such instrument when completed may be enforced against any person who became a party thereto prior to its completion, it must be filled up strictly in accordance with the authority given and within a reasonable time. But if any such instrument, after completion, is issued or negotiated to a holder in due course it is valid and effectual for all purposes in his hands, and he may enforce it as if it had been filled up strictly in accordance with the authority given and within a reasonable time.

[INCOMPLETE INSTRUMENT NEGOTIATED WITHOUT AUTHORITY, VOID.] § 15. Where an incomplete instrument has not been delivered it will not, if completed and negotiated, without authority, be a valid contract in the hands of any holder, as against any person whose signature was placed thereon before delivery.

[DELIVERY REQUIRED—WHEN PRESUMED.] § 16. Every contract on a negotiable instrument is incomplete and revocable until delivery of the instrument for the purpose of giving effect thereto. As between immediate parties, and as regards a remote party other than a holder in due course, the delivery, in order to be effectual, must be made either by or under the authority of the party making, drawing, accepting or indorsing, as the case may be; and in such case the delivery may be shown to have been conditional or for a special purpose only, and not for the purpose

of transferring the property in the instrument. But where the instrument is in the hands of a holder in due course, a valid delivery thereof by all parties prior to him so as to make them liable to him, is conclusively presumed. And where the instrument is no longer in the possession of a party whose signature appears thereon, a valid and intentional delivery by him is presumed until the contrary is proved.

[AMBIGUITIES AND OMISSIONS—RULES OF CONSTRUCTION.] § 17. Where the language of the instrument is ambiguous, or there are omissions therein, the following rules of construction apply:

1. Where the sum payable is expressed in words and also in figures and there is a discrepancy between the two, the sum denoted by the words is the sum payable; but if the words are ambiguous or uncertain, reference may be had to the figures to fix the amount.

2. Where the instrument provides for the payment of interest, without specifying the date from which interest is to run, the interest runs from the date of the instrument, and if the instrument is undated, from the issue thereof.

3. Where the instrument is not dated, it will be considered to be dated as of the time it was issued.

4. Where there is conflict between the written and printed provisions of the instrument, the written provisions prevail.

5. Where the instrument is so ambiguous that there is doubt whether it is a bill or a note, the holder may treat it as either, at his election.

6. Where a signature is so placed upon the instrument that it is not clear in what capacity the person making the same intended to sign, he is to be deemed an indorser.

7. Where an instrument containing the words "I promise to pay" is signed by two or more persons, they are deemed to be jointly and severally liable thereon.

[SIGNATURE—TRADE OR ASSUMED NAME.] § 18. No person is liable on the instrument whose signature does not appear thereon, except as herein otherwise expressly provided. But one who signs in a trade or assumed name will be liable to the same extent as if he had signed his own name.

[MAY BE SIGNED BY AGENT.] § 19. The signature of any party may be made by a duly authorized agent. No particular form of appointment is necessary for this purpose; and the authority of the agent may be established as in other cases of agency.

[DESCRIPTIVE WORDS ADDED TO SIGNATURE—WHEN SURPLUSAGE.] § 20. Where the instrument contains, or a person adds to his signature, words indicating that he signs for or on behalf of the principal, or in a representative capacity, he is not liable on the instrument if he was duly authorized; but the mere addition of words describing him as agent, or as filling a representative character without disclosing his principal, does not exempt him from personal liability.

[SIGNATURE BY PROCURATION—NOTICE OF LIMITED AUTHORITY.] § 21. A signature by "procuration" operates as notice that the agent has but limited authority to sign, and the principal is bound in case the agent in so signing acted within the actual limits of his authority.

[ASSIGNMENT BY INFANT OR CORPORATION PASSES TITLE.] § 22. The indorsement or assignment of the instrument by a corporation or by an infant passes the property therein, notwithstanding that

from want of capacity the corporation or infant may incur no liability thereon.

[FORGED SIGNATURE.] § 23. Where a signature is forged or made without authority it is wholly inoperative, and no right to retain the instrument or to give a discharge thereof, or to enforce payment thereof against any party thereto, can be acquired through or under such signature, unless the party against whom it is sought to enforce such right is precluded from setting up the forgery or want of authority.

ARTICLE II.—CONSIDERATION.

[CONSIDERATION PRESUMED.] § 24. Every negotiable instrument is deemed *prima facie* to have been issued for a valuable consideration, and every person whose signature appears thereon to have become a party thereto for value.

[CONSIDERATION — VALUE — PRE-EXISTING CLAIM.] § 25. Value is any consideration sufficient to support a simple contract.

2. An antecedent or pre-existing claim, whether for money or not, constitutes value where an instrument is taken either in satisfaction therefor or as security therefor and is deemed such, whether the instrument is payable on demand or at a future time.

[HOLDER FOR VALUE.] § 26. Where value has at any time been given for the instrument, the holder is deemed a holder for value in respect to all parties who became such prior to that time.

[VALUE PRESUMED TO EXTENT OF LIEN.] § 27. Whether the holder has a lien on the instrument arising either from contract or by implication of law, he is deemed a holder for value to the extent of his lien.

[ABSENCE OR FAILURE OF CONSIDERATION AS

DEFENSE.] § 28. Absence or failure of consideration is a matter of defense as against any person not a holder in due course, and partial failure of consideration is a defense *pro tanto*, whether the failure is an ascertained and liquidated amount or otherwise.

[ACCOMMODATION PAPER—LIABILITIES.] § 29. An accommodation party is one who has signed the instrument as maker, drawer, acceptor, or indorser, for the purpose of lending his name to some other person. Such a person is liable on the instrument to a holder for value, notwithstanding such holder at the time of taking the instrument knew him to be only an accommodation party, and in case a transfer after maturity was intended by the accommodating party notwithstanding such holder acquired title after maturity.

ARTICLE III.—NEGOTIATION.

[NEGOTIATION—HOW COMPLETED.] § 30. An instrument is negotiated when it is transferred from one person to another in such manner as to constitute the transferee the holder thereof; if payable to bearer, it is negotiated by delivery; if payable to order, it is negotiated by the indorsement of the holder, completed by delivery.

[INDORSEMENT, HOW MADE—NOT NEGATIVED BY ADDITIONAL WORDS.] § 31. The indorsement must be written on the instrument itself or upon a paper attached thereto. The signature of the indorser, without additional words, is a sufficient indorsement, and the addition of words of assignment or of guaranty shall not negative the additional effect of the signature as an indorsement unless otherwise expressly stated.

[INDORSEMENT MUST BE OF ENTIRE INSTRUMENT.] § 32. The indorsement must be an indorse-

ment of the entire instrument. An indorsement which purports to transfer to the indorsee a part only of the amount payable, or which purports to transfer the instrument to two or more indorsee severally, does not operate as a negotiation of the instrument. But where the instrument has been paid in part, it may be indorsed as to the residue.

[INDORSEMENT MAY BE BLANK, SPECIAL OR RESTRICTIVE.] § 33. An indorsement may be either in blank or special; and it may also be either restrictive or qualified, or conditional.

[INDORSEMENT IN BLANK PAYABLE TO BEARER.] § 34. A special indorsement specifies the person to whom or to whose order the instrument is to be payable; and the indorsement of such indorsee is necessary to the further negotiation of the instrument. An indorsement in blank specifies no indorsee, and an instrument so indorsed is payable to bearer, and may be negotiated by delivery.

[HOLDER MAY CONVERT BLANK INDORSEMENT INTO SPECIAL.] § 35. The holder may convert a blank indorsement into a special indorsement by writing over the signature of the indorser in blank any contract consistent with the character of the indorsement.

[RESTRICTIVE INDORSEMENT, ELEMENTS OF.] § 36. An indorsement is restrictive which either:

1. Prohibits the further negotiation of the instrument; or
2. Constitutes the indorsee the agent of the indorser; or
3. Vests the title in the indorsee in trust for or to the use of some other person. But the mere absence of words implying power to negotiate does not make an indorsement restrictive.

[RIGHTS CONFERRED BY RESTRICTIVE INDORSEMENTS.] § 37. A restrictive indorsement confers upon the indorsee the right:

1. To receive payment of the instrument.
2. To bring any action thereon that the endorser could bring.

(2. To bring any action thereon that the indorser could bring or accept in the case of a restrictive indorsement specified in section 36—sub-section 2, any action against the indorser or any prior party that a special indorsee would be entitled to bring.)

3. To transfer his rights as such indorsee, where the form of the indorsement authorizes him to do so.

(3. To transfer the instrument where the form of the indorsement authorizes him to do so.)

But all subsequent indorsees acquire only the title of the first indorsee under the restrictive indorsement specified in section 36—sub-section 1—and as against the principal or *cestui que trust* only the title of the first indorsee under the restrictive indorsements specified in section 36—sub-sections 2 and 3 respectively.

[QUALIFIED INDORSEMENT DOES NOT IMPAIR NEGOTIABILITY.] § 38. A qualified indorsement constitutes the indorser a mere assignor of the title to the instrument. It may be made by adding to the indorser's signature the words "without recourse" or any words of similar import. Such an indorsement does not impair the negotiable character of the instrument.

[CONDITIONAL INDORSEMENT OBLIGATORY ON INDORSEE.] § 39. Where an indorsement is conditional, a party required to pay the instrument may disregard the condition, and make a payment to the indorsee or his transferee, whether the condition has

been fulfilled or not. But any person to whom an instrument so indorsed is negotiated, will hold the same, or the proceeds thereof, subject to the rights of the person indorsing conditionally.

[REMOTE SPECIAL INDORSER PROTECTED.] § 40.

Where an instrument originally payable to or indorsed specifically to bearer is subsequently indorsed specially it may nevertheless be further negotiated by delivery; but the person indorsing specially is liable as indorser to only such holders as make title through his indorsement.

[WHEN PAYABLE TO SEVERAL, ALL TO INDORSE.]

§ 41. Where an instrument is payable to the order of two or more payees or indorseees who are not partners, all must indorse unless the one indorsing has authority to indorse for the others.

[PAPER DRAWN TO CASHIER DEEMED PAYABLE TO HIS BANK.] § 42. Where an instrument is drawn or indorsed to a person, as "Cashier" or other fiscal officer of a bank or corporation, it is deemed *prima facie* to be payable to the bank or corporation of which he is such officer; and may be negotiated by either the indorsement of the bank or corporation, or the indorsement of the officer.

[INDORSEMENT BY WRONGLY DESIGNATED PAYEE.]

§ 43. Where the name of the payee or indorsee is wrongly designated or misspelled, he may indorse the instrument as therein described, adding, if he thinks fit, his proper signature.

[INDORSEMENT IN REPRESENTATIVE CAPACITY MAY NEGATIVE PERSONAL LIABILITY.] § 44. Where any person is under obligation to indorse in a representative capacity, he may indorse in such terms as to negative personal liability.

[PRESUMPTION OF NEGOTIATION BEFORE MATURITY.] § 45. Except where an indorsement bears date after the maturity of the instrument, every negotiation is deemed *prima facie* to have been effected before the instrument was overdue.

[PRESUMPTIVE IDENTITY OF PLACE OF INDORSEMENT WITH DATE.] § 46. Except where the contrary appears, every indorsement is presumed *prima facie* to have been made at the place where the instrument is dated.

[NEGOTIABILITY CONTINUES TILL DISCHARGE BY INDORSEMENT, PAYMENT OR OTHERWISE.] § 47. An instrument negotiable in its origin continues to be negotiable until it has been respectively indorsed or discharged by payment or otherwise.

[OWNER MAY STRIKE OUT ANY INDORSEMENT—SUBSEQUENT INDORSERS RELEASED.] § 48. The owner may at any time strike out any indorsement which is not necessary to his title. The indorser whose indorsement is struck out, and all indorsers subsequent to him, are thereby relieved from liability on the instrument.

[TRANSFER WITHOUT INDORSEMENT—TITLE ACQUIRED.] § 49. Where the holder of an instrument payable to his order transfers it for value without indorsing it, the transferer vests in the transferee such title as the transferee had therein, and the transferee acquires, in addition, the right to enforce the instrument against one who signed for the accommodation of the transferer and the right to have the indorsement of the transferer if omitted by accident or mistake. But for the purpose of determining whether the transferee is a holder in due course, the negotiation takes effect as of the time when the indorsement is actually made.

[PRIOR INDORSER MAY ACQUIRE AND REISSUE PAPER, BUT CAN NOT ENFORCE AGAINST INTERVENING

INDORSERS.] § 50. Where an instrument is negotiated back to a prior party, such party may, subject to the provisions of this act, reissue and further negotiate the same, but he is not entitled to enforce payment thereof against any intervening party to whom he was personally liable.

ARTICLE IV.—RIGHTS OF THE HOLDER.

[HOLDER MAY SUE IN OWN NAME.] § 51. The holder of a negotiable instrument may sue thereon in his own name and payment to him in due course discharges the instrument.

[HOLDER IN DUE COURSE DEFINED.] § 52. A holder in due course is a holder who has taken the instrument under the following conditions:

1. That it is complete and regular upon its face;
- (1. That the instrument is complete and regular upon its face.)
2. That he became the holder of it before it was overdue, and without notice that it has been previously dishonored, if such was the fact.
3. That he took it in good faith and for value.
4. That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it.

[DEMAND PAPER MUST BE NEGOTIATED WITHIN REASONABLE TIME TO CONFER RIGHTS.] § 53. Where an instrument payable on demand is negotiated an unreasonable length of time after its issue, the holder is not deemed a holder in due course.

[TRANSFEREE RECEIVING NOTICE OF INFIRMITY AFTER PARTIAL PAYMENT PROTECTED ONLY PRO TANTO.] § 54. Where the transferee receives notice of any infirmity in the instrument or defect in the title of the person negotiating the same before he has paid the full

amount agreed to be paid therefor, he will be deemed a holder in due course only to the extent of the amount theretofore paid by him.

[TITLE DEFECTIVE THROUGH OBTAINING INSTRUMENT OR SIGNATURE THROUGH FRAUD OR DURESS.]

§ 55. The title of a person who negotiates an instrument is defective within the meaning of this act when he obtained the instrument, or any signature thereto, by fraud, duress, or force and fear, or other unlawful means, or for an illegal consideration or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud.

[NOTICE OF INFIRMITY — WHAT CONSTITUTES.]

§ 56. To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith.

[RIGHTS OF A HOLDER IN DUE COURSE.] § 57.

A holder in due course holds the instrument free from any defect of title of prior parties, and free from defenses available to prior parties among themselves and may enforce payment of the instrument for the full amount thereof against all parties liable thereon (except the defect and defense specified in section 10 of act entitled "An act to revise the law in relation to promissory notes, bonds, due bills and other instruments in writing," approved March 18, 1874, in force July 1, 1874, and except the defect and defense specified in sections 131 and 136 of an act to revise the law in relation to criminal jurisprudence, approved March 27, 1874, in force July 1, 1874, known as sections 131 and 136 of Chapter 38 of the Revised Statutes of Illinois,

and may enforce payment of the instrument for the full amount thereof against all parties liable thereon.)

[RIGHTS OF A HOLDER DERIVING HIS TITLE THROUGH HOLDER IN DUE COURSE.] § 58. In the hands of any holder other than a holder in due course, a negotiable instrument is subject to the same defenses as if it were non-negotiable. But the holder who derives his title through a holder in due course, and who is not himself a party to any fraud or duress or illegality affecting the instrument, has all the rights of such former holder in respect to all parties prior to such holder.

[PRESUMPTION IN FAVOR OF HOLDER IN DUE COURSE — SHIFTING BURDEN — EXCEPTION.] § 59. Every holder is deemed *prima facie* to be a holder in due course; but when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title as a holder in due course. But the last mentioned rule does not apply in favor of a party who became bound on the instrument prior to the acquisition of such defective title.

ARTICLE V.—LIABILITIES OF PARTIES.

[ENGAGEMENTS OF MAKER.] § 60. The maker of a negotiable instrument by making it engages that he will pay it according to its tenor, and admits the existence of the payee and his then capacity to indorse.

[ENGAGEMENTS OF DRAWER.] § 61. The drawer by drawing the instrument admits the existence of the payee and his then capacity to indorse, and engages that on due presentment the instrument will be accepted or paid, or both, according to its tenor,

and that if it be dishonored, and the necessary proceedings on dishonor be duly taken, he will pay the amount thereof to the holder, or to any indorser who may be compelled to pay it. But the drawer may insert in the instrument an express stipulation negating or limiting his own liability to the holder.

[ENGAGEMENTS OF ACCEPTOR.] § 62. The acceptor by accepting the instrument engages that he will pay it according to the tenor of his acceptance, and admits:

1. The existence of the drawer, the genuineness of his signature, and his capacity and authority to draw the instrument; and

2. The existence of the payee and his then capacity to indorse.

[SIGNING OTHERWISE THAN AS MAKER, DRAWER OR ACCEPTOR DEEMED AN INDORSEMENT UNLESS RESTRICTED.] § 63. A person placing his signature upon an instrument otherwise than as maker, drawer or acceptor is deemed to be an endorser, unless he clearly indicated by appropriate words his intention to be bound in some other capacity.

[LIABILITY OF INDORSER IN BLANK BEFORE DELIVERING.] § 64. Where a person, not otherwise a party to an instrument, places thereon his signature in blank before delivery, he is liable as indorser in accordance with the following rules:

1. If the instrument is payable to the order of a third person, he is liable to the payee and to all subsequent parties.

- (1. If the instrument is a note or bill, payable to the order of a third person or an accepted bill, payable to the order of the drawer, he is liable to the payee and to all subsequent parties.)

2. If the instrument is payable to the order of the maker or drawer, or is payable to bearer, he is liable to all parties subsequent to the maker or drawer.

(2. If the instrument is a note or unaccepted bill payable to the order of the maker or drawer, or is payable to bearer, he is liable to all parties subsequent to the maker or drawer.)

3. If he signs for the accommodation of the payee, he is liable to all parties subsequent to the payee.

[WARRANTIES IMPORTED BY NEGOTIATION BY DELIVERY OR QUALIFIED INDORSEMENT.] § 65. Every person negotiating an instrument by delivery or by a qualified indorsement, warrants:

1. That the instrument is genuine and in all respects what it purports to be.

2. That he has a good title to it.

3. That all prior parties had capacity to contract.

4. That he has no knowledge of any fact which would impair the validity of the instrument or render it valueless.

(4. That he has no knowledge of any fact which would impair the validity of the instrument.)

But when the negotiation is by delivery only, the warranty extends in favor of no holder other than the immediate transferee.

The provisions of subdivision three of this section do not apply to persons negotiating public or corporate securities, other than bills and notes.

[WARRANTIES OF ALL INDORSERS EXCEPT ACCOMMODATION INDORSERS WITH QUALIFICATION.] § 66. Every indorser not an accommodating party who indorses without qualification, warrants to all subsequent holders in due course:

1. The matters and things mentioned in subdivision one, two, three and four of the next preceding section; and

2. That the instrument is at the time of his indorsement valid and subsisting.

And, in addition, every indorser engages that on due presentment, it shall be accepted or paid, or both, as the case may be, according to its tenor, and that if it be dishonored and the necessary proceedings on dishonor be duly taken, he will pay the amount thereof to the holder, or to any subsequent indorser who may be compelled to pay it.

[INDORSEMENT OF INSTRUMENT NEGOTIABLE BY DELIVERY.] § 67. Where a person places his indorsement on an instrument negotiable by delivery he incurs all the liabilities of an indorser.

[INDORSERS LIABLE IN ORDER OF INDORSEMENTS—JOINT AND SEVERAL LIABILITY.] § 68. As respects one another, indorsers are liable *prima facie* in the order in which they indorse; but evidence is admissible to show that as between or among themselves they have agreed otherwise. All parties jointly liable on a negotiable instrument are deemed to be jointly and severally liable.

[LIABILITY OF BROKER OR AGENT NEGOTIATING INSTRUMENT WITHOUT INDORSEMENT.] § 69. Where a broker or other agent negotiated an instrument without indorsement, he incurs all the liabilities prescribed by section sixty-five of this act, unless he discloses the name of his principal, and the fact that he is acting only as agent.

[MEASURE OF DAMAGES ON PROTEST OF BILL DRAWN OR INDORSED WITHIN THIS STATE AND PAYABLE WITHOUT THE STATE.] § 69a. Whenever any bill of exchange drawn or indorsed within this state and

payable without this state is duly protested for non-acceptance or non-payment, the drawer or indorser thereof, due notice being given of such non-acceptance or non-payment, shall pay such bill at the current rate of exchange and with legal interest from the time such bill ought to have been paid until paid, together with the costs and charges of protest, and on bills payable in the United States in case suit has to be brought thereon and on bills payable without the United States with or without suit, 5% damages in addition.

ARTICLE VI.—PRESENTMENT FOR PAYMENT.

[PRESENTMENT, WHEN NECESSARY.] § 70. Presentment for payment is not necessary in order to charge the person primarily liable on the instrument except in case of bank notes; but if the instrument is, by its terms, payable at a special place and he is able and willing to pay it there at maturity, such ability and willingness are equivalent to a tender of payment upon his part. But except as herein otherwise provided, presentment for payment is necessary in order to charge the drawer and indorsers.

[TIME OF.] § 71. Where the instrument is not payable on demand, presentment must be made on the day it falls due. Where it is payable on demand, presentment must be made within a reasonable time after its issue, except that in case of a bill of exchange, presentment for payment will be sufficient if made within a reasonable time after the last negotiation thereof.

[ELEMENTS OF SUFFICIENCY.] § 72. Presentment for payment, to be sufficient, must be made:

1. By the holder, or by some person authorized to receive payment on his behalf.
2. At a reasonable hour on a business day.

3. At a proper place as herein defined.

4. To the person primarily liable on the instrument, or if he is absent or inaccessible, to any person found at the place where the presentment is made.

[REQUIREMENTS AS TO PLACE.] § 73. Presentment for payment is made at the proper place:

1. Where a place of payment is specified in the instrument and it is there presented.

2. Where no place of payment is specified and the address of the person to make the payment is given in the instrument and it is there presented.

3. Where no place of payment is specified and no address is given and the instrument is presented at the usual place of business or residence of the person to make payment.

4. In any other case, if presented to the person to make payment wherever he can be found, or if presented at his last known place of business or residence.

[EXHIBITION OF INSTRUMENT AND DELIVERY TO PARTY PAYING.] § 74. The instrument must be exhibited to the person from whom payment is demanded, and when it is paid must be delivered up to the party paying it.

[INSTRUMENT PAYABLE AT BANK MUST BE PRESENTED DURING BANKING HOURS—EXCEPTION.] § 75. Where the instrument is payable at a bank, presentment for payment must be made during banking hours, unless the person to make payment has no funds there to meet it at any time during the day, in which case presentment at any hour before the bank is closed on that day is sufficient.

[TO PERSONAL REPRESENTATIVE OF DECEASED MAKER OR INDORSER.] § 76. Where the person primarily liable on the instrument is dead, and no place of

payment is specified, presentment for payment must be made to his personal representative if such there be, and if with exercise of reasonable diligence, he can be found.

[PRESENTMENT FOR PAYMENT TO ANY ONE OF SEVERAL PARTNERS.] § 77. Where the persons primarily liable on the instrument are liable as partners, and no place of payment is specified, presentment for payment may be made to any one of them, even though there has been a dissolution of the firm.

[MUST BE MADE TO ALL PERSONS PRIMARILY LIABLE WHO ARE NOT PARTNERS.] § 78. Where there are several persons, not partners, primarily liable on the instrument, and no place of payment is specified, presentment must be made to them all.

[TO DRAWEE FOR PAYMENT NOT REQUIRED TO CHARGE DRAWER WHERE IT WOULD BE UNAVAILING.] § 79. Presentment for payment is not required in order to charge the drawer where he has no right to expect or require that the drawee or acceptor will pay the instrument.

[NOT REQUIRED TO CHARGE INDORSER UPON PAPER MADE FOR HIS ACCOMMODATION.] § 80. Presentment for payment is not required to charge an indorser where the instrument was made or accepted for his accommodation.

[DELAY IN MAKING, WHEN EXCUSED.] § 81. Delay in making presentment for payment is excused when the delay is caused by circumstances beyond the control of the holder, and not imputable to his default, misconduct or negligence. When the cause of delay ceases to operate, presentment must be made with reasonable diligence.

[WHEN DISPENSED WITH.] § 82. Presentment for payment is dispensed with:

1. When after the exercise of reasonable diligence presentment as required by this act cannot be made.

2. Where the drawee is a fictitious person.

3. By waiver of presentment, express or implied.

[INSTRUMENT DISHONORED BY NON-PAYMENT WHEN.] § 83. The instrument is dishonored by non-payment when:

1. It is duly presented for payment and payment is refused or cannot be obtained; or

2. Presentment is excused and the instrument is overdue and unpaid.

[IMMEDIATE RIGHT OF RECOURSE AGAINST ALL PARTIES SECONDARILY LIABLE ACCRUES TO HOLDER UPON DISHONOR BY NON-PAYMENT.] § 84. Subject to the provisions of this act, when the instrument is dishonored by non-payment, an immediate right of recourse to all parties secondarily liable thereon accrues to the holder.

[TIME OF PAYMENT—NO GRACE—SUNDAYS AND HOLIDAYS.] § 85. Every negotiable instrument is payable at the time fixed therein without grace. When the day of maturity falls upon Sunday, or a holiday, the instrument is payable upon the next succeeding business day. Instruments falling due on Saturday are to be presented for payment on the next succeeding business day, except that instruments payable on demand may, at the option of the holder, be presented for payment before 12:00 o'clock noon on Saturday, when that entire day is not a holiday.

[COMPUTATION OF TIME.] § 86. Where the instrument is payable at a fixed period after date, after sight, or after the happening of a specified event, the time of payment is determined by excluding the

day from which the time is to begin to run, and by including the date of payment.

§ 87. Where the instrument is made payable at a bank, it is equivalent to an order to the bank to pay the same for the account of the principal debtor thereon.

[WHAT IS PAYMENT MADE IN DUE COURSE.] § 88. Payment is made in due course when it is made at or after maturity of the instrument to the holder thereof in good faith and without notice that his title is defective.

ARTICLE VII.—NOTICE OF DISHONOR.

[NOTICE OF DISHONOR MUST BE GIVEN DRAWER AND EACH INDORSER.] § 89. Except as herein otherwise provided, when a negotiable instrument has been dishonored by non-acceptance or non-payment, notice of dishonor must be given to the drawer and to each indorser, and any drawer or indorser to whom such notice is not given is discharged.

[ON WHOSE BEHALF GIVEN.] § 90. The notice may be given by or on behalf of the holder, or by or on behalf of any party to the instrument who might be compelled to pay it to the holder, and who, upon taking it up, would have a right to reimbursement from the party to whom the notice is given.

[NOTICE MAY BE GIVEN BY AGENT.] § 91. Notice of dishonor may be given by an agent either in his own name or in the name of any party entitled to give notice, whether that party be his principal or not.

[NOTICE GIVEN BY HOLDER INURES FOR BENEFIT OF ALL PRIOR PARTIES.] § 92. Where notice is given by or on behalf of the holder, it inures for the benefit of all subsequent holders and all prior parties

who have a right of recourse against the party to whom it is given.

[NOTICE INURES FOR BENEFITT OF HOLDER AND ALL PARTIES SUBSEQUENT.] § 93. Where notice is given by or on behalf of a party entitled to give notice, it inures for the benefit of the holder and all parties subsequent to the party to whom notice is given.

[INSTRUMENT DISHONORED IN HANDS OF AGENT — NOTICE, HOW GIVEN.] § 94. Where the instrument has been dishonored in the hands of an agent, he may either himself give notice to the parties liable thereon, or he may give notice to his principal. If he gives notice to his principal, he must do so within the same time as if he were the holder, and the principal, upon the receipt of such notice, has himself the same time for giving notice as if the agent had been an independent holder.

[WRITTEN NOTICE MAY BE SUPPLEMENTED BY VERBAL COMMUNICATION.] § 95. A written notice need not be signed, and an insufficient written notice may be supplemented and validated by verbal communication. A misdescription of the instrument does not vitiate unless the party to whom the notice is given is in fact misled thereby.

[NOTICE MAY BE WRITTEN OR ORAL—PERSONALLY OR THROUGH MAIL.] § 96. The notice may be in writing or merely oral and may be given in any terms which sufficiently identify the instrument and indicate that it has been dishonored by non-acceptance or non-payment. It may in all cases be given by delivering it personally or through the mails.

[NOTICE OF DISHONOR MAY BE GIVEN TO PARTY OR AGENT.] § 97. Notice of dishonor may be given either to the party himself or to his agent in that behalf.

[SERVICE OF NOTICE UPON PERSONAL REPRESENTATIVE OF DECEASED PARTY.] § 98. Where any party is dead, and his death is known to the party giving notice, the notice must be given to a personal representative, if there be one, and if with reasonable diligence he can be found. If there be no personal representative, notice may be sent to the last residence or last place of business of the deceased.

[NOTICE TO ANY ONE OF SEVERAL PARTNERS SUFFICIENT.] § 99. Where the parties to be notified are partners, notice to any one partner is notice to the firm, even though there has been a dissolution.

[NOTICE TO JOINT PARTIES NOT PARTNERS TO BE GIVEN.] § 100. Notice to joint parties who are not partners must be given to each of them, unless one of them has authority to receive such notice for the others.

[NOTICE IN CASE OF BANKRUPT OR INSOLVENT.] § 101. Where a party has been adjudged a bankrupt or an insolvent, or has made an assignment for the benefit of his creditors, notice may be given either to the party himself or to his trustee or assignee.

[TIME OF GIVING NOTICE OF DISHONOR.] § 102. Notice may be given as soon as the instrument is dishonored, and unless delay is excused as hereinafter provided, must be given within the times fixed by this act.

[TIMES REQUIRED FOR NOTICE WHERE PERSONS GIVING AND RECEIVING RESIDE IN SAME PLACE.] § 103. Where the person giving and the person to receive notice reside in same place, notice must be given within the following times:

1. If given at the place of business of the person to receive notice, it must be given before the close of business hours on the day following.

2. If given at his residence, it must be given before the usual hours of rest on the day following.

3. If sent by mail, it must be deposited in the postoffice in time to reach him in the usual course on the day following.

[TIMES FOR NOTICE WHERE PERSONS GIVING AND RECEIVING RESIDE IN DIFFERENT PLACES.] § 104. Where the person giving and the person to receive notice reside in different places, the notice must be given within the following times:

1. If sent by mail, it must be deposited in the postoffice in time to go by mail the day following the day of dishonor, or if there be no mail at a convenient hour on that day, by the next mail thereafter.

2. If given otherwise than through the postoffice, then within the time that notice would have been received in due course of mail, if it had been deposited in the postoffice within the time specified in the last subdivision.

[NOTICE DULY MAILED DEEMED DUE NOTICE NOTWITHSTANDING MISCARRIAGE.] § 105. Where notice of dishonor is duly addressed and deposited in the postoffice, the sender is deemed to have given due notice, notwithstanding any miscarriage in the mails.

[DEPOSIT IN LETTER BOX SAME AS POSTOFFICE.] § 106. Notice is deemed to have been deposited in the postoffice when deposited in any branch postoffice or in any letter box under the control of the postoffice department.

[PARTY RECEIVING NOTICE HAS SAME TIME FOR NOTIFYING ANTECEDENT PARTIES.] § 107. Where a party receives notice of dishonor, he has, after the receipt of such notice, the same time for giving notice to antecedent parties that the holder has after dishonor.

[NOTICE SENT, TO WHAT ADDRESS.] § 108. Where a party has added an address to his signature, notice of dishonor must be sent to that address; but if he has not given such address, then the notice must be sent as follows:

1. Either to the postoffice nearest to his place of residence, or to the postoffice where he is accustomed to receive his letters; or

2. If he lives in one place, and has his place of business in another, notice may be sent to either place; or

3. If he is sojourning in another place, notice may be sent to the place where he is sojourning.

But where the notice is actually received by the party within the time specified in this act, it will be sufficient, though not sent in accordance with the requirements of this section.

[NOTICE MAY BE WAIVED.] § 109. Notice of dishonor may be waived, either before the time of giving notice has arrived, or after the omission to give due notice, and the waiver may be express or implied.

[WAIVER EMBODIED IN INSTRUMENT BINDING ON ALL PARTIES.] § 110. Where the waiver is embodied in the instrument itself, it is binding upon all parties; but where it is written above the signature of an indorser, it binds him only.

[WAIVER OF PROTEST WAIVES PRESENTMENT AND NOTICE OF DISHONOR.] § 111. A waiver of protest, whether in the case of a foreign bill of exchange or other negotiable instrument, is deemed to be a waiver not only of a formal protest, but also of a presentment and notice of dishonor.

[NOTICE OF DISHONOR, WHEN DISPENSED WITH.]

§ 112. Notice of dishonor is dispensed with when, after the exercise of reasonable diligence, it can not be given to or does not reach the parties sought to be charged.

[DELAY IN GIVING NOTICE OF DISHONOR, WHEN EXCUSED.] § 113. Delay in giving notice of dishonor is excused when the delay is caused by circumstances beyond the control of the holder and not imputable to his default, misconduct or negligence. When the cause of delay ceases to operate, notice must be given with reasonable diligence.

[NOTICE OF DISHONOR, WHEN NOT REQUIRED TO DRAWER.] § 114. Notice of dishonor is not required to be given to the drawer in either of the following cases:

1. Where the drawer and drawee are the same person.
2. Where the drawee is a fictitious person or a person not having capacity to contract.
3. Where the drawer is the person to whom the instrument is presented for payment.
4. Where the drawer has no right to expect or require that the drawee or acceptor will honor the instrument.
5. Where the drawer has countermanded payment.

[NOTICE OF DISHONOR, WHEN NOT REQUIRED TO INDORSER.] § 115. Notice of dishonor is not required to be given to an indorser in either of the following cases:

1. Where the drawee is a fictitious person or a person not having capacity to contract and the indorser was aware of the fact at the time he indorsed the instrument.

2. Where the indorser is the person to whom the instrument is presented for payment.

3. Where the instrument was made or accepted for his accommodation.

[NOTICE OF NON-ACCEPTANCE ANNULS NECESSITY FOR NOTICE OF SUBSEQUENT NON-PAYMENT.]

§ 116. Where due notice of dishonor by non-acceptance has been given, notice of a subsequent dishonor by non-payment is not necessary, unless in the meantime the instrument has been accepted.

[OMISSION OF NOTICE FOR NON-ACCEPTANCE NOT TO PREJUDICE HOLDER IN DUE COURSE SUBSEQUENTLY.] § 117. An omission to give notice of dishonor by non-acceptance does not prejudice the rights of a holder in due course subsequent to the omission.

[PROTEST REQUIRED ONLY IN FOREIGN BILLS.] § 118. Where any negotiable instrument has been dishonored it may be protested for non-acceptance or non-payment as the case may be; but protest is not required, except in the case of foreign bills of exchange.

ARTICLE VIII.—DISCHARGE OF NEGOTIABLE INSTRUMENTS.

[HOW DISCHARGED.] § 119. A negotiable instrument is discharged:

1. By payment in due course by or on behalf of the principal debtor.
2. By payment in due course by the party accommodated, where the instrument is made or accepted for accommodation.
3. By the intentional cancellation thereof by the holder.

4. By any other act which will discharge a simple contract for the payment of money;

(4. When the principal debtor becomes the holder of the instrument at or after maturity in his own right.)

[HOW SECONDARY LIABILITY DISCHARGED.] § 120.
A person secondarily liable on the instrument is discharged:

1. By an act which discharges the instrument.

2. By the intentional cancellation of his signature by the holder.

3. By the discharge of a prior party.

(3. By a valid tender of payment made by a prior party.)

4. By a release of the principal debtor, unless the holder's right of recourse against the part (party) secondarily liable is expressly reserved, or unless the principal debtor be an accommodating party.

5. By a release of the principal debtor, unless the holder's right of recourse against the party secondarily liable is expressly reserved.

(5. By an agreement in favor of the principal debtor binding upon the holder to extend the time of payment, or to postpone the holder's right to enforce the instrument, unless made with the assent prior or subsequent of the party secondarily liable, or unless the right of recourse against such party is expressly reserved, or unless the principal debtor be an accommodating party.)

6. By any agreement binding upon the holder to extend the time of payment, or to postpone the holder's right to enforce the instrument, unless made with the assent of the party secondarily liable, or unless the right of recourse against such party is expressly reserved.

[RIGHTS OF PARTY SECONDARILY LIABLE, ON PAYING.] § 121. Where the instrument is paid by a party secondarily liable thereon, it is not discharged; but the party so paying it is remitted to his former rights as regards all prior parties, and he may strike out his own and all subsequent indorsements, and again negotiate the instrument, except:

1. Where it is payable to the order of a third person and has been paid by the drawer; and

2. Where it was made or accepted for accommodation, and has been paid by the party accommodated.

[HOLDER MAY EXPRESSLY RENOUNCE HIS RIGHTS AGAINST ANY PARTY TO THE PAPER.] § 122. The holder may expressly renounce his rights against any party to the instrument before, at, or after its maturity. An absolute and unconditional renunciation of his rights against the principal debtor made at or after the maturity of the instrument, discharges the instrument. But a renunciation does not affect the rights of a holder in due course without notice. A renunciation must be in writing, unless the instrument is delivered up to the person primarily liable thereon.

[UNINTENTIONAL CANCELLATION INOPERATIVE—BURDEN OF PROOF.] § 123. A cancellation made unintentionally, or under a mistake, or without the authority of the holder, is inoperative; but where an instrument or any signature thereon appears to have been cancelled, the burden of proof lies on the party who alleges that the cancellation was made unintentionally, or under a mistake or without authority.

[MATERIAL OR FRAUDULENT ALTERATION OF INSTRUMENT.] § 124. Where a negotiable instru-

ment is fraudulently or materially altered by the holder without the assent of all the parties liable thereon, it is avoided except as against a party who has himself made, authorized or assented to the alteration and subsequent indorsers.

But when an instrument has been materially altered and is in the hands of a holder in due course, not a party to the alteration, he may enforce payment thereof according to its original tenor.

[WHAT ARE MATERIAL ALTERATIONS.] § 125.

Any alteration which changes:

1. The date.
2. The sum payable, either for principal or interest.
3. The time or place of payment.
4. The number and the relations of the parties.
5. The medium or currency in which payment is to be made.

Or which adds a place of payment where no place of payment is specified, or any other change or addition which alters the effect of the instrument in any respect, is a material alteration.

TITLE II.—BILLS OF EXCHANGE.

ARTICLE I.—FORM AND INTERPRETATION.

[BILL OF EXCHANGE DEFINED.] § 126. A bill of exchange is an unconditional order in writing addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand, or at a fixed or determinable future time, a sum certain in money to order or to bearer.

[NO ASSIGNMENT OF FUNDS UNTIL ACCEPT-

ANCE.] § 127. A bill of itself does not operate as an assignment of the funds in the hands of the drawee available for the payment thereof, and the drawee is not liable on the bill unless and until he accepts the same.

[MAY BE ADDRESSED TO SEVERAL DRAWEES JOINTLY, BUT NOT IN THE ALTERNATIVE.] § 128. A bill may be addressed to two or more drawees jointly, whether they are partners or not; but not to two or more drawees in the alternative or in succession.

[INLAND AND FOREIGN BILLS.] § 129. An inland bill of exchange is a bill which is, or on its face purports to be, both drawn and payable within this state. Any other bill is a foreign bill. Unless the contrary appears on the face of the bill, the holder may treat it as an inland bill.

[MAY BE TREATED AT OPTION AS A BILL OR NOTE.] § 130. Where in a bill drawer and drawee are the same person, or where the drawee is a fictitious person, or a person not having capacity to contract, the holder may treat the instrument at his option, either as a bill of exchange or a promissory note.

[REFEREE IN CASE OF NEED.] § 131. The drawer of a bill and any indorser may insert thereon the name of a person to whom the holder may resort in case of need, that is to say, in case the bill is dishonored by non-acceptance or non-payment. Such person is called the referee in case of need. It is the option of the holder to resort to the referee in case of need, or not, as he may see fit.

ARTICLE II.—ACCEPTANCE.

[ACCEPTANCE MUST BE IN WRITING AND UNCONDITIONAL.] § 132. The acceptance of a bill is

the signification by the drawee of his assent to the order of the drawer. The acceptance must be in writing and signed by the drawee. It must not express that the drawee will perform his promise by any other means than the payment of money.

[HOLDER MAY REQUIRE ACCEPTANCE WRITTEN ON BILL.] § 133. The holder of a bill presenting the same for acceptance may require that the acceptance be written on the bill, and if such request is refused may treat the bill as dishonored.

[EFFECT OF ACCEPTANCE ON SEPARATE PAPER.] § 134. Where an acceptance is written on a paper other than the bill itself, it does not bind the acceptor except in favor of a person who, on the faith thereof, receives the bill for value.

[EFFECT OF PROMISE IN WRITING TO ACCEPT A BILL.] § 135. An unconditional promise in writing to accept a bill before or after it is drawn is deemed an actual acceptance in favor of every person who, upon the faith thereof, receives the bill for value.

[TWENTY-FOUR HOURS ALLOWED FOR DECISION AS TO ACCEPTANCE.] § 136. The drawee is allowed twenty-four hours after presentment in which to decide whether or not he will accept the bill; but the acceptance, if given, dates as the day of presentation.

[WHEN BILL MAY BE ACCEPTED.] § 137. A bill may be accepted before it has been signed by the drawer, or while otherwise incomplete, or when it is overdue, or after it has been dishonored by a previous refusal to accept, or by non-payment.

[ACCEPTANCE AFTER DISHONOR REINSTATES ORIGINAL DATE.] § 138. But when a bill payable after sight is dishonored by non-acceptance and the

drawee subsequently accepts it, the holder, in the absence of any different agreement, is entitled to have the bill payable accepted as of the date of the first presentment.

[GENERAL AND QUALIFIED ACCEPTANCE.] § 139.

An acceptance is either general or qualified. A general acceptance assents without qualification to the order of the drawer. A qualified acceptance in express terms varies the effect of the bill as drawn.

[ACCEPTANCE TO PAY AT PARTICULAR PLACE.]

§ 140. An acceptance to pay at a particular place is a general acceptance unless it expressly states that the bill is to be paid there only, and not elsewhere.

[QUALIFIED ACCEPTANCE CHARACTERIZED.] § 141.

An acceptance is qualified which is:

1. Conditional; that is to say, which makes payment by the acceptor dependent on the fulfillment of a condition therein stated.
2. Partial; that is to say, an acceptance to pay part only of the amount for which the bill is drawn.
3. Local; that is to say, an acceptance to pay only at a particular place.
4. Qualified as to time.
5. The acceptance of some one or more of the drawees, but not of all.

[QUALIFIED ACCEPTANCE MAY BE REFUSED—EFFECT IF TAKEN.] § 142. The holder may refuse to take a qualified acceptance, and if he does not obtain an unqualified acceptance, he may treat the bill as dishonored by non-acceptance. Where a qualified acceptance is taken, the drawer and indorsers are discharged from liability on the bill, unless they have expressly or impliedly authorized the holder to take a qualified acceptance, or subsequently assent thereto.

When the drawer or indorser receives notice of a qualified acceptance, he must within a reasonable time express his dissent to the holder, or he will be deemed to have assented thereto.

ARTICLE III.—PRESENTMENT FOR ACCEPTANCE.

[WHEN PRESENTMENT REQUIRED.] § 143. Presentment for acceptance must be made:

1. Where the bill is payable after sight, or in any other case where presentment for acceptance is necessary in order to fix the maturity of the instrument; or

2. Where the bill expressly stipulates that it shall be presented for acceptance; or

3. Where the bill is drawn payable elsewhere than at the residence or place of business of the drawee.

In no other case is presentment for acceptance necessary in order to render any party to the bill liable.

[MUST BE PRESENTED OR NEGOTIATED WITHIN REASONABLE TIME.] § 144. Except as herein otherwise provided, the holder of a bill which is required by the next preceding section to be presented for acceptance must either present it for acceptance or negotiate it within a reasonable time. If he fails to do so, the drawer and all indorsers are discharged.

[WHEN, HOW AND UPON WHOM PRESENTMENT FOR ACCEPTANCE TO BE MADE.] § 145. Presentment for acceptance must be made by or on behalf of the holder at a reasonable hour, on a business day, and before the bill is overdue, to the drawee or some person authorized to accept or refuse acceptance on his behalf; and:

1. Where a bill is addressed to two or more drawees who are not partners, presentment must be made to them all, unless one has authority to accept or refuse acceptance for all, in which case presentment may be made to him only.

2. Where the drawee is dead, presentment may be made to his personal representative.

3. Where the drawee has been adjudged a bankrupt or an insolvent, or has made an assignment for the benefit of creditors, presentment may be made to him or to his trustee or assignee.

[WHEN PRESENTMENT TO BE MADE.] § 146. A bill may be presented for acceptance on any day on which negotiable instruments may be presented for payment under the provisions of sections seventy-two and eighty-five of this act. When Saturday is not otherwise a holiday, presentment for acceptance may be made before twelve o'clock noon on that day.

[WHEN DELAY IS EXCUSED.] § 147. Where the holder of a bill drawn payable elsewhere than at the place of business or residence of the drawee has not time, with the exercise of reasonable diligence, to present the bill for acceptance before presenting it for payment on the day that it falls due, the delay caused by presenting the bill for acceptance before presenting it for payment is excused and does not discharge the drawers and indorsers.

[WHEN PRESENTMENT IS EXCUSED.] § 148. Presentment for acceptance is excused and a bill may be treated as dishonored by non-acceptance in either of the following cases:

1. Where the drawee is dead, or has absconded, or is a fictitious person or a person not having capacity to contract by bill.

2. Where, after the exercise of reasonable diligence, presentment cannot be made.

3. Where, although presentment has been irregular, acceptance has been refused on some ground.

[WHEN A BILL IS DISHONORED BY NON-ACCEPTANCE.] § 149. A bill is dishonored by non-acceptance:

1. When it is duly presented for acceptance and such an acceptance as is prescribed by this act is refused or cannot be obtained; or

2. When a presentment for acceptance is excused and the bill is not accepted.

[DILATORY PRESENTMENT RENDERS BILL DISHONORED FOR NON-ACCEPTANCE.] § 150. Where a bill is duly presented for acceptance and is not presented within the prescribed time, the person presenting it must treat the bill as dishonored by non-acceptance, or he loses the right of recourse against the drawer and indorsers.

[DISHONOR BY NON-ACCEPTANCE RENDERS PRESENTMENT FOR PAYMENT UNNECESSARY.] § 151. When a bill is dishonored by non-acceptance, an immediate right of recourse against the drawers and indorsers accrues to the holders, and no presentment for payment is necessary.

ARTICLE IV.—PROTEST.

[PROTEST OF FOREIGN BILL.] § 152. Where a foreign bill appearing on its face to be such is dishonored by non-acceptance, it must be duly protested for non-acceptance, and where such a bill which has not previously been dishonored by non-acceptance is dishonored by non-payment, it must be duly protested for non-payment. If it is not so protested,

the drawer and indorsers are discharged. Where a bill does not appear on its face to be a foreign bill, protest thereof, in case of dishonor, is unnecessary.

[SPECIFICATIONS OF PROTEST.] § 153. The protest must be annexed to the bill or must contain a copy thereof, and must be under the hand and seal of the notary making it and must specify:

1. The time and place of presentment.
2. The fact that presentment was made and the manner thereof.
3. The cause or reason for protesting the bill.
4. The demand made and the answer given, if any, of the fact that the drawee or acceptor could not be found.

[BY WHOM PROTEST MADE.] § 154. Protest may be made: by

1. A notary public; or
2. By any respectable resident of the place where the bill is dishonored, in the presence of two or more credible witnesses.

[WHEN PROTEST TO BE MADE.] § 155. When a bill is protested, such protest must be made on the day of its dishonor, unless delay is excused as herein provided. When a bill has been duly noted, the protest may be subsequently extended as of the date of the noting.

[WHERE PROTEST TO BE MADE.] § 156. A bill must be protested at the place where it is dishonored, except that when a bill drawn payable at the place of business or residence of some person other than the drawee, has been dishonored by non-acceptance, it must be protested for non-payment at the place where it is expressed to be payable; and no other presentment for payment to, or demand on, the drawee is necessary.

[SUBSEQUENT PROTEST FOR NON-PAYMENT MAY BE MADE.] § 157. A bill which has been protested for non-acceptance may be subsequently protested for non-payment.

[PROTEST MAY BE HAD IN CASES OF BANKRUPTS OR INSOLVENTS.] § 158. When the acceptor has been adjudged a bankrupt or an insolvent or has made an assignment for the benefit of creditors, before the bill matures, the holder may cause the bill to be protested for better security against the drawer and indorsers.

[WHEN PROTEST MAY BE DISPENSED WITH OR DELAY EXCUSED.] § 159. Protest is dispensed with by any circumstances which would dispense with notice of dishonor. Delay in noting or protesting is excused when delay is caused by circumstances beyond the control of the holder and not imputable to his default, misconduct or negligence. When the cause of delay ceases to operate, the bill must be noted or protested with reasonable diligence.

[PROTEST ON COPY OF LOST BILL.] § 160. Where a bill is lost or destroyed or is wrongly detained from the person entitled to hold it, protest may be made on a copy or written particulars thereof.

ARTICLE V.—ACCEPTANCE FOR HONOR.

[ACCEPTANCE BY THIRD PARTY FOR HONOR.] § 161. Where a bill of exchange has been protested for dishonor by non-acceptance, or protested for better security, and is not overdue, any person not being a party already liable thereon, may, with the consent of the holder, intervene and accept the bill *supra* protest for the honor of any party liable thereon or for the honor of the person for whose account the bill

is drawn. The acceptance for honor may be for part only of the sum for which the bill is drawn, and where there has been an acceptance for honor for one party there may be a further acceptance by a different person for the honor of another party.

[ACCEPTANCE FOR HONOR MUST BE IN WRITING.]

§ 162. An acceptance for honor *supra* protest must be in writing and indicate that it is an acceptance for honor, and must be signed by the acceptor for honor.

[DEEMED FOR HONOR OF DRAWER WHEN NOT EXPRESSED.] § 163. Where an acceptance for honor does not expressly state for whose honor it was made, it is deemed to be an acceptance for the honor of the drawer.

[TO WHOM ACCEPTOR FOR HONOR LIABLE.] § 164. The acceptor for honor is liable to the holder and to all parties to the bill subsequent to the party for whose honor he has accepted.

[ENGAGEMENTS OF ACCEPTOR FOR HONOR.] § 165. The acceptor for honor by such acceptance engages that he will, on due presentment, pay the bill according to the terms of his acceptance, provided it shall not have been paid by the drawee, and provided also that it shall have been duly presented for payment and protested for non-payment and notice of dishonor given to him.

[ACCEPTANCE FOR HONOR DATES FROM NON-ACCEPTANCE.] § 166. When a bill payable after sight is accepted for honor, its maturity is calculated from the date of the noting for non-acceptance and not from the date of the acceptance for honor.

[BILL ACCEPTED FOR HONOR MUST BE PROTESTED FOR NON-PAYMENT, ETC.] § 167. Where a dis-

honored bill has been accepted for honor *supra* protest or contains a reference in case of need, it must be protested for non-payment before it is presented for payment to the acceptor for honor or referee in case of need.

[PRESENTMENT FOR PAYMENT TO ACCEPTOR FOR HONOR, HOW MADE.] § 168. Presentment for payment to the acceptor for honor must be made as follows:

1. If it is to be presented in the place where the protest for non-payment was made, it must be presented not later than the day following its maturity.

2. If it is to be presented in some other place than the place where it was protested, then it must be forwarded within the time specified in section 103.

[DELAY IN MAKING PRESENTMENT TO ACCEPTOR FOR HONOR.] § 169. The provisions of section 81 apply where there is delay in making presentment to the acceptor for honor or referee in case of need.

[PROTEST FOR NON-PAYMENT BY ACCEPTOR FOR HONOR.] § 170. When the bill is dishonored by the acceptor for honor it must be protested for non-payment by him.

ARTICLE VI.—PAYMENT FOR HONOR.

[ANY PERSON MAY PAY SUPRA PROTEST FOR HONOR.] § 171. Where a bill has been accepted for non-payment, any person may intervene and pay it *supra* protest for the honor of any person liable thereon or for the honor of the person for whose account it was drawn.

[MUST BE ATTESTED BY NOTARIAL ACT OF HONOR.] § 172. The payment for honor *supra* protest in order to operate as such and not as a mere

voluntary payment must be attested by a notarial act of honor which may be appended to the protest or form an extension to it.

[PAYER MUST DECLARE INTENTION, AND FOR WHOSE HONOR.] § 173. The notarial act of honor must be founded on a declaration made by the payer for honor or by his agent in that behalf declaring his intention to pay the bill for honor and for whose honor he pays.

[PREFERENCE AMONG PERSONS OFFERING TO PAY FOR HONOR.] § 174. Where two or more persons offer to pay a bill for the honor of different parties, the person whose payment will discharge most parties to the bill is to be given the preference.

[DISCHARGE OF PARTIES SUBSEQUENT TO PARTY FOR WHOSE HONOR PAID.] § 175. Where a bill has been paid for honor, all parties subsequent to the party for whose honor it is paid are discharged, but the payer for honor is subrogated for, and succeeds to, both the rights and duties of the holder as regards the party for whose honor he pays and all parties liable to the latter.

[EFFECT OF HOLDER REFUSING TO RECEIVE PAYMENT SUPRA PROTEST.] § 176. Where the holder of a bill refuses to receive payment *supra* protest, he loses his right of recourse against any party who would have been discharged by such payment.

[PAYER FOR HONOR ENTITLED TO RECEIVE BILL AND PROTEST.] § 177. The payer for honor, on paying to the holder the amount of the bill and the notarial expenses incidental to its dishonor, is entitled to receive both the bill itself and the protest.

ARTICLE VII.—BILLS IN A SET.

[THE WHOLE OF THE PARTS OF A BILL DRAWN

IN A SET CONSTITUTE ONE BILL.] § 178. Where a bill is drawn in a set, each part of the set being numbered and containing a reference to other parts, the whole of the parts constitute one bill.

[PARTS OF SET NEGOTIATED TO DIFFERENT HOLDERS—TRUE OWNER.] § 179. Where two or more parts of a set are negotiated to different holders in due course, the holder whose title first accrues is, as between such holders, the true owner of the bill. But nothing in this section affects the rights of a person who in due course accepts or pays the part first presented to him.

[HOLDER INDORSING MORE THAN ONE PART LIABLE ON ALL SUCH.] § 180. Where the holder of a set indorses two or more parts to different persons he is liable on every such part, and every indorser subsequent to him is liable on the part he has himself indorsed, as if such parts were separate bills.

[ACCEPTANCE ON MORE THAN ONE PART.] § 181. The acceptance may be written on any part and it must be written on one part only. If the drawee accepts more than one part, and such accepted parts are negotiated to different holders in due course, he is liable on every such part as if it were a separate bill.

[ACCEPTOR LIABLE ON OUTSTANDING PART ACCEPTED BY HIM.] § 182. When the acceptor of a bill drawn in a set pays it without requiring the part bearing his acceptance to be delivered up to him, and that part at maturity is outstanding in the hands of a holder in due course, he is liable to the holder thereon.

[PAYMENT OF ONE PART DISCHARGES ALL.] § 183. Except as herein otherwise provided, where any one part of a bill drawn in a set is discharged by payment or otherwise, the whole bill is discharged.

TITLE III.—PROMISSORY NOTES AND CHECKS.

ARTICLE I.

[WHAT IS A NEGOTIABLE PROMISSORY NOTE.]

§ 184. A negotiable promissory note within the meaning of this act is an unconditional promise in writing made by one person to another, signed by the maker, engaging to pay on demand or at a fixed or determinable future time, a sum certain in money to order or to bearer. Where a note is drawn to the maker's own order, it is not complete until indorsed by him.

[WHAT IS A CHECK.] § 185. A check is a bill of exchange drawn on a bank payable on demand. Except as herein otherwise provided, the provisions of this act are applicable to a bill of exchange payable on demand apply to a check.*

[REQUISITE ACTION ON CHECKS, PRESENTMENT, NOTICE, ETC.] § 186. A check must be presented for payment within a reasonable time after its issue, and notice of dishonor given to the drawer as provided for in the case of bills of exchange, or the drawer will be discharged from liability thereon to the extent of the loss caused by the delay.

[CERTIFICATION EQUIVALENT TO ACCEPTANCE.] § 187. Where a check is certified by the bank on which it is drawn, the certification is equivalent to an acceptance.

[CERTIFICATION DISCHARGES ALL DRAWERS AND INDORSERS.] § 188. Where the holder of a check procures it to be accepted or certified, the drawer and all indorsers are discharged from liability thereon.

[CHECK DOES NOT OPERATE AS ASSIGNMENT OF FUND UNTIL ACCEPTANCE.] § 189. A check of

*Note.—As per copy.

itself does not operate as an assignment of any part of the funds to the credit of the drawer with the bank, and the bank is not liable to the holder, unless and until it accepts or certifies the check.

TITLE IV.—GENERAL PROVISIONS.

ARTICLE I.

[TITLE OF ACT.] § 190. This act shall be known as the Negotiable Instrument Law.

[MEANING OF WORDS USED IN ACT.] § 191. In this act, unless the context otherwise requires:

“Acceptance” means an acceptance completed by delivery or notification.

“Action” includes counter-claim and set-off.

“Bank” includes any person or association of persons carrying on the business of banking, whether incorporated or not.

“Bearer” means the person in possession of a bill or note which is payable to bearer.

“Bill” means bill of exchange, and “note” means negotiable promissory note.

“Delivery” means transfer of possession, actual or constructive, from one person to another.

“Holder” means the payee or indorsee of a bill or note, who is in possession of it, or the bearer thereof.

“Indorsement” means an indorsement completed by delivery.

“Instrument” means negotiable instrument.

“Issue” means the first delivery of the instrument, complete in form, to a person who takes it as a holder.

“Person” includes a body of persons, whether incorporated or not.

“Value” means valuable consideration.

“Written” includes printed, and “writing” includes print.

[PERSON PRIMARILY LIABLE.] § 192. The person “primarily” liable on an instrument is the person who, by the terms of the instrument, is absolutely required to pay the same. All other parties are “secondarily” liable.

[REASONABLE TIME.] § 193. In determining what is a “reasonable time” or an “unreasonable time,” regard is to be had to the nature of the instrument, the usage of trade or business (if any) with respect to such instruments, and the facts of the particular case.

[TIME PRESCRIBED—SUNDAYS AND HOLIDAYS, ETC.] § 194. Where the day, or the last day, for doing an act herein required or permitted to be done falls on Sunday or on a holiday, the act may be done on the next succeeding secular or business day.

[PROVISIONS OF ACT NOT TO APPLY TO PREVIOUSLY GIVEN INSTRUMENTS.] § 195. The provisions of this act do not apply to negotiable instruments made and delivered prior to the passage hereof.

[LAW MERCHANT TO GOVERN CASES NOT PROVIDED IN THIS ACT.] § 196. In any case not provided for in this act, the rules of the law merchant shall govern.

TWENTY-SEVENTH SUBJECT.

Guaranty and Suretyship.

BY

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CHAPTER I.

NATURE OF THE CONTRACT.

SECTION 1. THE CONTRACT IN GENERAL.

The contract of suretyship and the contract of guaranty, which latter is merely a subdivision of the suretyship contract, is of peculiar interest, inasmuch as the contract is always an express one, and never arises by implication. The suretyship contract arises on the agreement that the surety or guarantor makes with the creditor to answer for the debt, default or miscarriage of another person. Since by the nature of the contract, the surety or guarantor takes on the obligation for which the principal debtor is originally liable, the surety or guarantor is called the obligor, and the one to whom his promise runs (the creditor) is called the obligee. The parties to the contract, strictly then, are only the obligor and the obligee, although the presence of and the continuing liability of the principal debtor to the creditor, is always an essential thing to make the contract one of suretyship. If the promise is not to answer for the debt, default or miscarriage of another person, whose liability continues, it would then be an original promise of the promissor and the promissor would not be a surety at all, so if the promise is to answer for the debt of another, the debt of the other person being thereby cancelled, the promissor's debt is original, and he is in no way a surety. So that the principal debtor is to be considered as always having a presence in the contract of suretyship, even though he is not a party to the contract of suretyship strictly. The surety's contract

must always be collateral to the contract of the principal debtor.

SECTION 2. ORIGIN AND ESSENTIALS OF THE CONTRACT.

The surety's contract is one of the oldest known to the law; just how old this kind of contract is, it seems impossible to say, except that its origin is of such an ancient date, and some of its characteristics were so well known to the ancients, that it may well be looked upon as an antique among contracts. The essentials of the contract of suretyship include, in addition to the essentials of any valid contract, viz.: that the parties to the contract be competent to contract, that their contract be in the form prescribed by the law, that there be a consideration to support the contract, that its object be lawful, and that the consent given be in no way interfered with by mistake, misrepresentation, fraud, duress or undue influence; the further essential, dictated by the statute of frauds, that the contract agreement be evidenced by a writing, signed by the surety or guarantor, showing the agreement with sufficient definiteness to identify the parties and to show the terms of the obligation, together, usually, with the naming of the consideration.

SECTION 3. THE PRINCIPAL.

The one originally obligated to the creditor for his own debt is called the principal, or the principal debtor, and since the principal debtor is so closely connected with the surety's contract with the creditor, which is to answer for the principal's default, the principal must not be lost sight of, as his relation and his

contract with the creditor is the basis of the surety's contract. The principal debtor is the one whose debt or default the surety agrees to answer for, or, in other words, his possible unpaid debt or default is the basis of the transaction between the creditor and the surety. The principal may be one in charge of certain sums of money, or one holding an office, carrying with it the duty to keep safe the funds intrusted to him, and one who personally becomes security for any default of the principal in the conduct of that office, and would be in default on his agreement when the principal defaults in his duties for which the surety has become the security. The principal's obligation which the surety may secure may be of a wide range. His failure to pay any debt, or the possible breach in a promise to perform some obligation, or a possible miscarriage of his duties or obligations, owing to another, for all or any of these things, the surety may by express contract, make himself liable, the obligation of the principal continuing also.

SECTION 4. THE SURETY.

Judge Cooley, in the case of *Smith vs. Sheldon*,¹ says: "A surety is a person who, being liable to pay a debt or perform an obligation, is entitled, if it is enforced against him, to be indemnified by some other person, who ought himself to have made payment or performed before the surety was compelled to do so."

The surety is one, then, who, by his express contract in writing, agrees to answer to the creditor for the debt, default or miscarriage of another. But to be a surety there must always exist the continuing liability of the principal debtor, for it is a general rule

¹ 35 Mich., 47; see also *Wendlandt vs. Sobre*, 37 Minn., 162.

of law, that whatever discharges the principal, will likewise discharge the surety. It is also necessary that the promise to answer for the debts and obligations of another, must be made expressly in writing, and to the one to whom the duties or obligations are owing, viz., the creditor. A promise made directly to the debtor, to pay his debt, for instance, would be an original promise.

The surety, as such, could not make a promise to answer for a debt, which is partly the debt of another, and partly his own debt. This would be an original promise. He must not have any personal interest, or responsibility, in the obligation, he agrees to answer for on behalf of another, if he would claim the rights and remedies of the surety. His promise, furthermore, must be collateral, and if credit is extended to him, and not to the one originally seeking it, his promise would be original, he would not be a surety at all.

It is not necessary that the principal debtor have knowledge of the fact, that another has become surety for the debt, if there exists a consideration to support the obligation of the surety, moving from the creditor to the surety. Another instance of showing that the principal debtor is not really a party to the surety's contract, is that a false representation on the part of the principal debtor amounting to a fraud, and made to the surety to induce him to become a surety, would not make the surety's contract voidable unless the creditor, with whom the surety contracts, was a party to the fraud.

SECTION 5. DISTINCTION BETWEEN A SURETY AND A GUARANTOR.

Although a surety and a guarantor are both parties who make an express agreement to bind them-

selves for the performance of an act or the fulfillment of an obligation or duty of another, the distinctions between the contract of the two persons, and the obligations assumed under their contract, can be sharply made. A surety, as a general rule, is a party to the original contract of the principal, he signs his name to the original agreement at the same time the principal signs, and the consideration for the principal's contract is the consideration for the agreement of the surety's. The surety is therefore bound on his contract from the very beginning, and he is bound also to inform himself of the defaults of the principal debtor, and he is not in any part relieved from his obligations under the contract by the creditor's failure to inform him of the principal's default in the contract, for which contract the surety has become the security for. A guarantor, on the other hand, usually does not make his agreement to answer for the principal's debt or default, contemporaneously with the principal or by the same agreement, but his obligation is entered into subsequently to the making of the original agreement, and his agreement is not the contract that the principal makes, and hence a new consideration is required to support it. The contract of the principal's, not being the one the guarantor makes, he is not bound to inform himself of default, or failure of principal to perform his contract. The creditor is also under the obligation to inform the guarantor of the principal's default, not strictly in the sense of being obliged to give notice immediately after demand on the day the obligation matures, as in the case of an indorser, but if a failure to give notice materially prejudices the rights of the guarantor, the guarantor can claim a discharge on the obligation to the extent

of the injury suffered.³ The contract of the guarantor is not only collateral, but it is secondary; the surety's contract is primary and direct.³

The guarantor is liable only after the default of the principal; the liability is established by the default of the principal, and by showing performance of the conditions of the contract.⁴ But on discussing the distinctions between the surety and the guarantor in respect to the liability assumed, we must remember that guaranties are of two kinds, the conditional guaranty, and the absolute guaranty. In the former the guarantor is only liable after the condition of the guarantor's contract is fulfilled. So, then, where A guarantees the collectibility of a certain sum for another person, his obligation matures when the creditor makes the showing that the debt is not collectible; this usually requires the exhausting of all the legal remedies to collect, as by securing a judgment against the principal debtor, and having execution issue on the judgment, together with the sheriff's return showing that the execution cannot be made, because the principal has no goods or property, that may be sold when levied on, to satisfy the execution. An absolute guaranty is one that arises where the guarantor fixes the time to pay, as of some date certain; in this kind of guaranty it is not necessary that the creditor first take steps against the principal to charge the guarantor, as, for instance, where the guaranty is for the payment of a bond according to its terms,⁵ or a guaranty for the payment of a promissory note at its maturity.⁶ It has also been held that an absolute

³ *Graff vs. Simms*, 45 Ind., 262;
Harris vs. Newell, 42 Wis., 687.

⁵ *Milroy vs. Quinn et al.*, 69 Ind.,
406.

⁴ *Atwood vs. Lester*, 20 R. I., 660.

⁵ *Roberts vs. Ridle*, 79 Pa. St., 468.

⁶ *Campbell vs. Baker*, 46 Pa. St.,
243.

guarantor is not discharged by the creditor's delay in enforcing payment from the principal.⁷ It may be said, further, that it makes little difference whether the promissor calls himself a surety or guarantor, the terms of the agreement will control, in determining whether it is to be considered a contract of a surety or of a guarantor.

SECTION 6. THE LIABILITY OF THE SURETY.

It is the general rule, that the liability of a surety or a guarantor cannot be extended by implication or construction beyond the precise terms of their contract.⁸

The above rule is of universal application, no matter what variety of agreement the surety's contract may assume, and it is founded on the soundest principles of justice and public policy. From the practice of the courts in limiting the liability of the surety to the strict terms of his contract, the statement is made that the surety is a favorite of the law, but the use of the expression must not be misunderstood. The surety position is usually one of special misfortune, where his principal defaults, and the favor of the law is to excuse him for nothing that he has expressly bound himself to answer for, but the favor extends only to keeping his liability strictly within the terms of his agreement. The liability of the surety then is determined by the meaning of the language of his contract. A reasonable interpretation of the language used is to be had, and practically the same rules of construction are to be observed, in determining what the contract was, and in arriving

⁷ Hooker vs. Gooding, 86 Ill., 60.

⁸ Brandt on Suretyship and Guaranty, Vol. 1, Sec. 93; Vinyard

vs. Barnes, 124 Ill., 346; Gunn vs. Geary, 44 Mich., 615; Burson vs. Andes, 83 Va., 445.

at the intention of the parties, as are usually employed. These things are to be gathered, as in other cases, from the surrounding circumstances. The terms of the contract, and the circumstances, must be examined in any case, to ascertain the extent of the liability and the character of the obligation assumed.⁹

SECTION 7. THE CO-SURETY.

Parties who become liable for the same debt of another person, contracting with the same obligee, are co-sureties, and it is not necessary that they become sureties for the debt at the same time, as the other sureties; that is to say, co-sureties need not make their contracts contemporaneously, nor, need they become surety for the same amount, nor is privity of contract an essential, nor is it necessary that they even know that there is another, who is also liable as surety for the same debt.¹⁰

Where one of two or more co-sureties pays the debt of the principal debtor, he is entitled to contribution against his co-sureties, that is, he may maintain a suit for the sum, that he has paid in excess of the sum that he himself, as against his co-sureties, would be obliged to pay. *Indebitatus assumpsit* is the proper action by one co-surety against another, to recover the proportionate share of the common liability due from the co-surety.¹¹ But one who is a surety for another surety is not liable in contribution.¹² Other rights of the co-surety as against his co-surety will be spoken of later under a separate head.

SECTION 8. THE GRANTOR OF MORTGAGED PROPERTY.

It is a general rule of law that the grantee of mortgaged premises, who agrees to assume the mort-

⁹ Welsh vs. Ebersole, 75 Va., 656.

¹⁰ Matthews vs. Millsaps, 58 Miss., 564.

¹¹ Weeks vs. Parsons, 176 Mass., 570.

¹² Allen vs. State, 61 Ind., 268.

gage, becomes the principal debtor for the payment of the mortgage, and that the grantor of the premises becomes the surety with all the rights of a surety. In the case of *Moore vs. Topliff*,¹³ notes were given by a partnership firm composed of A, B and C and indorsed to third parties, which notes were secured by a mortgage to the creditors, from C, on the real estate. A afterward sold out all his interest in the firm to B and C, who assumed all the firm indebtedness, and formed a new partnership, the new firm paying interest on the notes until their bankruptcy, in which proceedings in bankruptcy the creditors proved their debts, and received forty-two per cent as a composition, in full discharge of the personal liability of B and C. Held, that as A was still personally liable on the notes as surety for B and C the mortgage was not extinguished, and that A's existing equity, as surety, to have the mortgage security surrendered by the creditors to him upon his payment of the balance of the debt, was unaffected by the bankruptcy discharge.

The obligation of the surety will not be implied, yet the law itself will extend the privileges and rights of a surety, to one who is bound to answer for the default of others who by their agreement, contracted to meet the indebtedness and relieve the person who subsequently has to pay the debt, which the other person's default has put back on his shoulders.¹⁴

SECTION 9. PLEDGING OR MORTGAGING PROPERTY TO SECURE DEBT OF ANOTHER.

Property itself may be said to occupy the position of a surety, where it is pledged by the one owning the

¹³ 107 Ill., 241.

¹⁴ *Ayers vs. Dixon*, 78 N. Y., 318;

Smith vs. Sheldon, 35 Mich., 42.

same, as security for the default of another person.¹⁵ Where one member of a partnership pledges his own property for the payment of the firm debts, here the property is in the situation of a surety, and as against those who claim an interest in the property, the creditor must observe the rights of the surety.¹⁶

SECTION 10. PARTNERS ASSUMING PARTNERSHIP DEBT.

In the case where certain members of a partnership firm assume the partnership debts and continue the business on the retirement of one of the members, this does not release the retiring member from the debts already contracted, unless the creditors so agree. But it gives the retiring member the right to claim the rights and privileges of the surety, as against the firm members who are continuing the business and who assume the firm debts.¹⁷

SECTION 11. JOINT CONTRACTS.

It is the general rule that if one is jointly liable for the payment of a debt with the principal, the contract is not within the statute of frauds. Holding that if the promise is joint, that the promise is original as to both promissors.¹⁸ But it is oftentimes a question of fact as to whether the promise was, or was not, a joint promise. Where several parties sign a joint note as makers, and it is known to the creditor that some of them or one of them is a surety, the surety showing this fact, may either in a court of law, or in a court of equity, claim the rights and privileges of the surety.¹⁹ The true contract in such a case

¹⁵ Allen vs. O'Donnell, 28 Fed. Rep., 346.

95; Smith vs. Sheldon, 35 Mich., 95.

¹⁶ Lowry vs. McKinnie, 68 Pa. St., 294.

¹⁷ Ex parte Lowe, 1 De Gex, 300; Brown on Statute of Frauds.

¹⁸ Colgrave vs. Tallman, 67 N. Y.,

¹⁹ Kennedy vs. Evans, 31 Ill., 258.

may be shown. It is also the general rule that one of the makers of a joint note under seal may show at law, and by parol, that he is a surety, and these decisions are founded on the same reasons that are given in the case of a note not under seal.²⁰ Joint parties to a note each have all the rights of a surety, so far as the payment of the shares of the others are concerned, and an act by the creditor discharging one, would thereby discharge the other.²¹

²⁰ *Rodgers vs. School Trustees*, 46 Ill., 428.

²¹ *Clark vs. Dane*, 128 Ala., 122.

CHAPTER II.

PARTIES TO THE CONTRACT.

SECTION 12. WHO MAY BECOME A SURETY OR A GUARANTOR.

In general, it may be stated that anyone who has legal capacity to enter into a contract, may bind himself on his contract to answer for the debt, or default of another, and in general it may be said the party may be considered incompetent to bind himself as a surety, where his ordinary contracts would be either void or voidable. The promissor in suretyship must not be of unsound mind, or be under the lawful age to contract, and at common law the fact that the promissor was a feme covert, that is a married woman, would disqualify her from making a binding contract of suretyship, so also the usual rule of partial disability of the partnership, and the corporation to contract generally, would prevail in the matter of their ability to answer for the debt, or default of another. In addition to the common law disability there exists in certain states, the statutory rule that certain other persons, such as attorneys-at-law shall not be proper sureties where the debtor is the surety's client, in the matter of the attorney signing a bond for instance, but these rules are made rather for the purpose of justifying the public officer in the rejection of such a surety, rather than to make the contract of such a surety invalid once it has been entered into, and once such a surety has been accepted as such, he is usually bound on his contract notwithstanding the law's prohibition

against his acceptance under the circumstances of the particular case.

SECTION 13. INFANTS AS SURETIES.

Since the rule of law has been changed, so that the accepted understanding is, that an infant's express contracts are to be now considered as voidable, and not void contracts, it may be said that the courts for the most part are inclined to agree that the infant's contract of suretyship is voidable, and not void, unless the contract would necessarily operate to unduly prejudice the rights of the infant. It remains therefore with the infant in the case of contracts of an uncertain nature to exercise his election, of avoiding the contract if he sees fit.¹ In *Harner vs. Dipple*,² the court says: "This immunity to infants (the right to avoid the contract), is intended for their protection against imposition and imprudence and is continued after their majority as a mere personal privilege * * * whenever he the (infant) arrives at majority * * * the law presumes that he has acquired all the wisdom and prudence necessary for the proper management of his affairs; hence the law imposes on him full responsibility for all his acts and contracts." An infant therefore who ratifies his contract of suretyship after reaching his majority with a full knowledge of the fact that he was not bound on the original contract, will be bound by his ratification. It may be added here that infancy of the principal debtor, would be no defense to the liability of an adult surety.³

¹ *Keans vs. Bagoott*, 2 H. Black, 511.

² 31 O. S., 72.

³ *Dexter vs. Planchard*, 11 Allen, 365.

SECTION 14. MARRIED WOMEN AS SURETIES.

The common law rule was that a married woman could make no contracts, except where she contracted in reference to her own separate estate. As it was the usual rule that her fortune or estate vested in the husband, her contracts as a surety were held invalid.

By rule of statute, the married woman is enabled now, to retain and control her own property and hence may make all contracts including the contract of suretyship, the same as if unmarried.⁴ The statutes of the different states are of course not exactly uniform, but the married woman's disability to contract has for the most part, been removed, but where the enabling act has not been passed they cannot properly become a surety or grantor.⁵ In Georgia and in some other states, a married woman where she binds her separate estate is forbidden to enter into a contract as surety for another, even though that other be her husband, and the debt be one, in part to obtain goods for the family.⁶

SECTION 15. INSANE PERSON AS SURETY.

One who is of unsound mind, cannot bind himself upon a contract of suretyship, even though the creditor acted in good faith in entering into the contract, and was not aware of the fact of insanity in the surety.⁷ A more difficult question as to liability, has been presented to the courts, in the case where the principal debtor is a lunatic, and one becomes surety on the lunatic's contract, the question being, can the surety be held. The question is answered in the

⁴ *Low Bros. & Co. vs. Anderson*,
41 Iowa, 476.

⁶ *Gosmar vs. Cruger*, 69 N. Y., 87.

⁵ *Smith vs. Hardman*, 99 Ga., 38.

⁷ *Van Patton & Marks vs. Beale*,
& H., 46 Iowa, 62.

affirmative, the grounds for the decision being the same as given in the case of the holding a surety liable on his contract to answer for debt of a married woman.⁸ It being assumed that the surety knew of the disability of the principal debtor, and to have made his contract with that fact in mind, and the surety being himself competent to contract, is bound.

SECTION 16. PARTNERSHIPS AND CORPORATIONS AS SURETIES.

A partnership is a proper promissor in a contract of suretyship, provided the contract comes within the scope of the business of the partnership, or is expressly joined in, by all the members of the partnership firm for a partnership purpose. Where the contract is not within the scope of the firm's business, one partner has no implied power to bind the firm.⁹ But the firm itself may change the scope of the business. A partner acting without express or implied authority would bind himself alone.

A corporation's right to become a surety is regulated by the powers granted to it in the charter, or where the making of the contract would be necessary to properly carry out the express purposes of its creation.¹⁰ The power of a state or national bank to act as surety is regulated by the language of the statute under which they are organized. Under the National Banking Act, there is given the implied power to National Banks to act as a surety, whenever it becomes necessary for the bank to so act in negotiating its paper.¹¹

⁸ Lee vs. Yandell, 69 Texas, 34.

⁹ Osborn vs. Stone, 30 Minn., 25;
Avery vs. Rowell, 59 Miss., 82.

¹⁰ Arnot vs. Erie Ry. Co., 67 N. Y.,
315.

¹¹ Peoples Bank vs. National Bank,
101 U. S., 123.

SECTION 17. ATTORNEYS-AT-LAW AS SURETIES.

Sometimes by statute, an attorney-at-law may be prohibited from acting as a surety or signing a bond as surety for his client, but the disability simply goes to the penalty, usually, for the violation of the statute, and under the principle of estoppel the surety is held liable on his obligation as assumed,¹² if notwithstanding the statute, his bond is accepted. And the fact that such a surety is held liable on the bond, would not relieve him from his offense of breaking the rule of the statute, and he would still be liable to answer to the courts for his wrong. The rule prohibiting such a person from acting as a surety is founded on the principles of public policy; the punishment would be by fine, or punishment as for contempt of court.

A statute, the provisions of which state, that an attorney shall not be received as bail in a criminal case, is held to be directory only. The attorney who signs such a bond and is received as the surety in such a case, would be bound on the contract.¹³ He will not be permitted afterward to plead his incapacity, as a defense to the suit on the bond.

SECTION 18. SURETY UNDER DURESS.

Following the general rule of contract law, duress avoids the contract, where a surety becomes such by reason of being compelled to sign under duress. It is the better rule too, that duress practiced on the principal debtor alone will relieve the surety, as well as the debtor himself, in the case where the surety is ignorant of the true conditions existing between the principal debtor and the creditor.¹⁴ Where the surety

¹² *State vs. Findley*, 101 Mo., 368.

¹³ *Sherman vs. State*, 4 Kan., 570;
Hollandsworth vs. Common-

wealth, 11 Bush., 617.

¹⁴ *Peacock et al. vs. People*, 23 Ill., 331.

signs with full knowledge of the duress, he cannot then, on the ground of the duress, escape liability on the contract. The argument usually advanced is, that if the principal contract is invalid, then the contract of the surety, which exists by reason of the principal's contract, is likewise invalid. But duress makes the contract voidable only, and not void.

SECTION 19. FRAUD IN THE CONTRACT.

Fraud practiced on the surety by the creditor, will make the contract voidable, so fraud practiced on the surety by the principal debtor with the knowledge of the creditor will likewise avoid the contract,¹⁵ as concealment of the principal's fraud by the creditor, would amount to a fraud on the surety, and it would be a violation of the duty of good faith owing from the creditor to the surety, but if the principal debtor practices a fraud on the surety, of which the creditor has no knowledge even though this is the thing that induces the surety to make the contract, the surety will not on that account be released from liability to the creditor.¹⁶ The courts are particularly severe in enforcing the rule, on the creditor, in reference to his exercising good faith in informing the prospective surety of the true facts in connection with the contract, so far as they deem good faith requires him to inform the surety. Fraud, deceit or concealment, amounting to fraud, will avoid the contract.¹⁷

SECTION 20. GUARANTY AND SURETY COMPANIES.

A great part of the surety business is now sought for and managed by incorporated companies, and

¹⁵ *Waterbury vs. Andrews*, 67 Mich., 281.

¹⁶ *Casoni vs. Jerome*, 58 N. Y., 315.

¹⁷ *Doughty vs. Savage*, 28 Conn., 146; *Booy vs. State*, 39 N. J. Law, 135.

most of the states have by statute opened the way for the creation and operation of corporations transacting such business. Where the charter of the corporation permits them, and the law accepts them, surety companies may act as sole surety in the matter of private obligations, or in official business as the surety upon the bonds of public officers.¹⁸

As to the validity of statutes, we quote from Brandt on Suretyship, Vol. 1, Sec. 14: "Statutes authorizing the organization of corporations for the purpose of guaranteeing bonds and undertaking as well the fidelity of persons holding positions of public or private trust, are held valid and such companies may lawfully become liable as sureties or guarantors."¹⁹

¹⁸ Travis vs. Travis, 48 Hun., 343.

¹⁹ Hurd vs. Hannibal & St. Jos. R.

R. Co., 33 Hun., 169; Cramer vs. Tittle, 72 Calif., 12.

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CHAPTER III.

MAKING THE CONTRACT.

SECTION 21. CONSIDERATION.

The contract of suretyship is no exception to the rule of law that every contract requires a consideration to support it. Where the surety's contract is made contemporaneously or concurrently with the principal debtor's, one consideration answers for both contracts.¹ It is not required that the consideration move directly to the surety himself. The consideration is usually some benefit that accrues to the principal debtor, or some forbearance given or detriment suffered by the creditor. The promise of the surety or guarantor may follow the making of the original contract; if so, a new consideration must follow to support the surety's contract. A past consideration will not suffice. The consideration must not be illegal, either by rule of the common law or statute, nor must it be opposed to the rule of public policy.²

SECTION 22. DELIVERY.

Where the contract of suretyship takes the form of a bond, or in any case where the contract is under seal, delivery and acceptance of the bond is required to complete the contract and to put the bond into effect. The delivery must be unconditional; it may be by actual manual delivery, or it may be made by the surety placing the contract beyond his own control and by the obligee treating such delivery as a true delivery and

¹ *Bailey vs. Croft*, 4 Taunt., 611.

² *Rouse vs. Mohr*, 29 Ill. App., 321.

acting under it. This would be a constructive delivery. *Prima facie* proof of delivery is made by showing possession by the obligee of the bond. Possession also imports acceptance and approval.³ A promise to answer for the debt of another, where the writing is not in the form of a specialty, need not be delivered; the statute of frauds does not require a delivery of the memorandum of the agreement.

A bond that is not delivered until after the death of the obligor will not be binding on the surety.⁴ Delivery of a bond to a third person, to be delivered to the obligee, will constitute sufficient delivery to bind the surety.

SECTION 23. IMPERFECT OR INCOMPLETE INSTRUMENT.

It is a general rule of law that where the promisor in suretyship puts the written contract in the hands of the principal, and authorizes him to fill the blanks, the surety will be bound by the acts of the principal, even though the principal disobeys instructions and fills in the blanks in a manner wholly unauthorized.⁵ The rule is one of the law of agency, and it is thought to be absolutely necessary, in order that third persons, dealing with agents, may be relieved from the chance of fraud and surprise, when they deal with agents apparently vested with authority.⁶ It is perhaps a broad application of the principle, that secret instructions of the principal have no force in binding third parties. In some cases the law gives the right to the beneficiary named in the contract to fill in certain blanks.

³ *Bank of U. S. vs. Dandridge*,
12 White, 64.

⁴ *Fay vs. Richardson*, 7 Pick., 91.

⁵ *Cawley et al. vs. The People*, 95

Ill., 249; *Butler vs. U. S.*, 21
Wall., 272.

⁶ *Fullerton vs. Sturges*, 4 Ohio St.,
529.

SECTION 24. SURETY WHO BINDS HIMSELF AS PRINCIPAL.

Where one, who in fact is a surety on a contract, by express terms binds himself as a principal, by naming himself as a principal, he will be liable as such, and he can claim none of the rights of a surety. By signing as principal to the obligation, he waives the rights and privileges he might have claimed by making his contract one of suretyship only.⁷ Where a number of parties sign a bond and all add the word principal after their names, and there is nothing to indicate that any of them are sureties, they will all be bound as principals, notwithstanding some were sureties merely; it is held also in such a case that they could not plead a defense to the contract by showing that an extension of time was given for the payment of the debt.⁸ It is a general rule subject to certain exceptions that sureties are estopped to deny the facts stated in their contract.⁹

SECTION 25. CONSTRUCTION OF THE CONTRACT.

Following the general rule that suretyship contracts are to be strictly construed, and that the liability of the surety shall rest on the express language used, and that the liability shall not be increased by implication, it follows that where the language used is ambiguous in part, it is the rule that the courts will endeavor to so construe the contract and to give it an interpretation as to prevent a forfeiture of the instrument if possible. There is no apparent way, however, to reconcile the decisions of the courts on this point. One line of decisions hold that the surety who is responsible for the use of ambiguous words, which mis-

⁷ *McMillan vs. Parkell*, 64 Mo., 286.
⁸ *Spring vs. Bank of Mount Pleasant*, 10 Peters, 257.

⁹ *Gordle vs. Burch*, 10 Gratt (Va.), 480.

lead or tend to mislead the other party, uses such words at his peril, and the words so used will be construed most strongly against the surety. This line of decisions gives the obligee the right to adopt his construction of the contract, provided it is reasonable and provided he acts on it and it is employed by the surety in the contract.¹⁰ The other line of decisions follows the rule laid down by Chief Justice Marshall in the case of *Russel vs. Clark* in which he says: "It is the duty of the individual who contracts with one man on the credit of another not to trust to ambiguous phrases and strained constructions, but to require an explicit and plain declaration of the obligation he is about to assume."¹¹

Many decisions, on the question involved, have followed the rule enunciated by Chief Justice Marshall, giving a construction tending to the opposite of the other line of decisions.¹²

¹⁰ *Tausig vs. Reid et al.*, 145 Ill., 488; *Rindge vs. Judson*, 24 N. Y., 64.

¹¹ 7 Cranch, 90

¹² *Cutler vs. Ballou*, 136 Mass., 337; *Morgan vs. Boyer*, 30 Ohio State, 324.

CHAPTER IV.

LIABILITY AND RIGHTS OF SURETY.

SECTION 26. THE EXTENT OF THE SURETY'S LIABILITY.

The meaning of the surety's contract having been determined, it remains for the court to say whether a strict construction in favor of the surety should be given the contract, or whether the contract should receive the same construction as any other contract. The general rule, which it seems in reason is to be preferred, is to adopt the latter of the two constructions and bring to the analysis of the surety's liability the same rules of construction that are generally to be applied by the courts in the construction of the ordinary contract.¹ For instance, the courts have frequently applied to suretyship contracts the general rule that a contract is to be most strongly construed against the person who is responsible for the language used in the contract; likewise the courts have endeavored to sustain the obligation of the surety where another construction would leave the creditor without a remedy. In any event it is to be remembered that all questions of construction are for the court. It is the duty of the court and the court alone to construe the contract.²

In *Keeler vs. Herr*, the Illinois Court says: "Where the contract is in writing, it is for the court to state its meaning; * * * the acts of the parties are to be looked to, only where there is a doubt as to the mean-

¹ *Shreffler vs. Nadelhoffer*, 133 Ill., 536.

² *Machine Co. vs. Laster*, 81 Ill. App., 316.

ing of the contract, arising from the ambiguity of the words or phrases used."*

The student of law should bear in mind that in determining the liability of the surety, and in passing on defenses that the surety might plead as the privilege of his office, there should be no confusion of the rule that a surety is a favorite of the law, with the application of the general rules of construction to the surety's contract. The general rules of construction are in no way to interfere with the rule that the surety has the right to stand on the strict terms of the contract, and to claim a discharge where the contract is altered in any respect without his consent. Usually the surety secures no personal benefit on his contract of suretyship; the purpose of the contract is to assist the principal debtor; therefore he in justice ought to be bound no further than he has expressly obligated himself. In the application of this principle, in this sense, he is a favorite of the law. The contract of suretyship will not begin until the day is reached named in the contract, and will close at the time stipulated, if the parties have agreed on the time in the contract. In such instances, where the terms of the contract are not made uncertain, the liability is limited strictly as shown by the terms of the contract.

SECTION 27. SURETY MAY BE SUED BEFORE PRINCIPAL—WHEN.

When the surety's contract or the guarantor's contract is the same as the principal's, he may be sued before the principal is sued, and as soon as the principal is in default, because the promissor in the suretyship contract is likewise then immediately in default.⁴ The

* 157 Ill., 57.

• Hoey vs. Jarman, 39 N. J. L.

523; Redfield vs. Haight,
27 Conn., 31.

bringing of the suit alone is sufficient demand as to the surety in such a case; he is bound to observe the default of his principal. It is also held that the creditor is not bound to exhaust any remedies he might have on mortgage security, which he has also taken to secure the debt, but he may proceed at once against the surety personally. Nor would the bankruptcy of the principal debtor, make it necessary for the creditor to delay his action against the surety, and proceed to file his claim in the bankruptcy court and await the disbursement of the bankrupt's estate; nor is he bound to delay his action even though the claim has been filed in the bankruptcy court against the bankrupt's estate. Some states have adopted the rule of the civil law, and give the surety the right to compel the creditor to proceed first to sue the principal debtor, at the expense of the surety, a bond usually being required of the surety to protect the creditor against loss. A guarantor who guarantees payment of a debt at some time certain is an absolute guarantor, and may be sued if the debt is not paid, without first suing the principal, but where the guaranty is made conditional, by the promise reading that the guarantor is to be considered as a conditional guarantor, as for instance a guarantor for the collectibility of the debt, then the creditor must exhaust his legal remedies in an endeavor to make collections, or show authoritatively that a suit against the principal debtor followed by an execution, or other proper steps to collect, would be unavailing.⁵ Exhausting his remedies against the principal debtor is held to be a condition precedent to the creditor's right to hold the guarantor, unless the guaranty is an absolute one.

⁵ *Lemmon vs. Strong*, 55 Conn., 443;
French vs. March, 29 Wis., 649.

SECTION 28. SURETY NOT LIABLE BEYOND PENALTY OF HIS BOND.

Another example of strict construction of the surety's contract is in the holding that the amount named in the surety's bond is the maximum sum that could be recovered in a suit instituted on the bond.⁶ This being in accordance with the obligation of the surety's agreement, the penalty in the bond must therefore be considered as the limit of promissor's obligation. Where, however, after the surety is in default, he delays meeting his obligation, he must answer, in addition, for the legal rate of interest on the money due on the obligation and withheld from the creditor.⁷ The rule is sometimes stated that, when the obligation matures on the default of the principal, then the surety being also in default, he must answer for the consequences of his own delay in meeting the obligation thereafter.⁸

Some courts hold that interest runs from the date of breach, others from the date of demand. But it is held, nevertheless, that the doctrine that the surety is not to be liable beyond the penalty named in the bond does not apply where the bond is conditional for the performance of a covenant other than the payment of money. In such a case, *quantum damnicatus* is the issue.⁹

A surety, or guarantor, is likewise liable for stipulated damages to be paid in case of breach, and this may include the expense of suit, attorney's fees and additional damages. This would be the case, for instance,

⁶ *Leggett vs. Humphreys*, 21 How. (U. S.), 66.

⁷ *Harris vs. Clap*, 1 Mass., 308.

⁸ *Frink et al. vs. Southern Ex. Co.*, 82 Ga., 33.

⁹ *Beers vs. Shannon*, 73 N. Y., 202.

where the surety agrees to answer "for all legal or other expenses, or for collection."¹⁰

SECTION 29. INSTANCES WHERE SURETY NOT LIABLE.

Where a surety's obligation is to answer for the acts or obligations of several persons he will not be liable for the act of one of the several persons alone.¹¹ So a surety whose liability is limited to the acts of one person cannot be held liable for the acts of that person acting with others.¹²

This is simply another application of the rule that a surety is not to be bound beyond the express terms of the contract. And one who guarantees against loss for merchandise sold to a partnership will not be liable for goods sold to the partnership after the membership of the firm has been changed.¹³ The partnership as changed is not in law the partnership existing before the change in its membership. So where a note is signed by a surety, with the maker thereof, to be used for a particular purpose, and the principal diverts the note from that purpose and the transferee has notice of that fact, the surety was held not to be bound.¹⁴ This was in other words held to be a departure from the contract as made.

One who consents to be liable as a surety for a particular purpose, cannot be presumed to have intended that his liability for the amount be extended for any other purpose, than the one stated in the contract.

¹⁰ *McGhee vs. Importers & Traders Nat. Bank*, 93 Ala., 192.

¹¹ *Bill vs. Parker*, 15 Gray, 62.

¹² *White Sewing Machine Co. vs. Hines*, 61 Mich., 423.

¹³ *In re Cinques*, 109 Fed. Rep., 455.

¹⁴ *Brown vs. Tabor*, 5 Wend., 566.

SECTION 30. WHEN SURETY MAY TERMINATE HIS LIABILITY BY NOTICE.

It is the general rule that the surety once he has become such cannot terminate his contract by giving notice to the obligee that he will not thereafter be liable further on the contract. This axiomatic principle must not be confused with the right of one who has offered himself as a guarantor to revoke his offer before it has been acted upon, or acceptance made of the offer. So, where authority is given by one to another person to draw on him and to accept the drafts so drawn, for a limited period, it is held that the authority is taken away by the death of the one who has authorized such credit.¹⁵ But here, again, the question is treated as one of agency purely.

Whenever the surety's contract carries with it the right to revoke on giving notice, this would ordinarily mean the giving of such a notice as would reasonably protect the obligee, in the absence of any certain stated time for the notice. Ordinarily the death of the surety will not have the effect of releasing his estate from liability for the further default of the principal within the time for which the surety's contract is to run.¹⁶ If all contracts of suretyship were to terminate on the death of the surety, they would be of very doubtful efficacy as a security to the obligee. The rule is, therefore, one of common sense and justice.

SECTION 31. IN GENERAL, WHAT THINGS WILL DISCHARGE THE SURETY.

It may be first stated generally, that whatever discharges the principal will likewise discharge the surety, and it follows that a release of the principal

¹⁵ *Michigan State Bank vs. Estate of Leavenworth*, 28 Vt., 209.

¹⁶ *Estate of Rapp vs. The Phoenix Ins. Co.*, 113 Ill., 390.

debtor by the creditor would also release the surety.¹⁷ But if the creditor specially reserves his right to hold the surety, at the time he agrees to release the surety, the release will be construed as a covenant not to sue merely, and the surety will still be liable.¹⁸

When the rule is stated, that that which releases the principal will likewise release the surety, this does not include a release of the principal by operation of law. The most common case of such a release by act or operation of law, is a discharge of the principal in bankruptcy, which discharge does not carry with it the release of the surety.

It has been held by some courts that where the principal is named with the surety in a written obligation, but the principal fails to sign with the surety, that the contract is incomplete and therefore the surety is not bound.

Fraud on the part of the creditor, which is the inducement of the contract, would have the same effect as it would have in any contract; it would make the surety's contract a voidable one. As to what constitutes fraud sufficient to give the surety a right to claim a discharge will presently be spoken of specially.

One of the most frequent defenses claimed by the surety as a discharge from his liability under the contract, is that the terms of the contract have been materially altered by the obligee, so that the contract as changed imposes new conditions and are an increase of risk on the surety. And it is the rule that where the creditor by his own act or conduct has added new hazards to the surety's obligation, or where a new

¹⁷ Trotter vs. Strong, 63 Ill., 272.

¹⁸ Bell vs. Manning, 11 Gratt, Ch.

142; Green vs. Wynn Law Rep., 4 Ch. App., Cas. 204.

contract has been substituted for the original contract of the surety, that a discharge may be claimed, and will be allowed. But the rule might be stated in a more simplified way, by saying, that it makes no difference whether the risks of the contract have been increased, or diminished, the surety has a right to claim a discharge for any material alteration of his contract.¹⁹

A violation, by the creditor, of the duties of his relation to the surety, as by the voluntary release of security belonging to the principal and held by the creditor, or the release of securities arising by reason of the misconduct of the creditor, have the effect of releasing the surety to the extent of the injury he suffers thereby; the surety being unable on account of the release of the security, to avail himself of his right to be subrogated to the creditor's rights in such securities. The law puts on the creditor the duty of observing the trust relationship that arises between him and the surety, where he acquires additional security for the payment of the obligation from the principal debtor.²⁰

SECTION 32. ILLUSTRATION OF DISCHARGE BY MATERIAL ALTERATION.

Changing the date in a note only one day, without the surety's consent, was held to be a material alteration, even though the change was made to express the real intention of the parties. This case is an illustration of showing the strictness of the courts in forbidding any tampering with a written contract. In that case the law held it to be a material alteration and sufficient to discharge the surety,²¹ and it may be said to be the policy of the law to discourage anything that would

¹⁹ *Patterson vs. McNeeley*, 16 Ohio State 348; *Hessell vs. Johnson*, 63 Michigan, 623.

²⁰ *Kirkpatrick vs. Houk*, 80 Ill., 122.

²¹ *Newman et al vs. King*, 54 Ohio State, 273.

tend to interfere with the maintenance of the integrity of written instruments. The law does not distinguish between an alteration of a written instrument made by the creditor or by the principal debtor; the surety will be discharged by any alteration unless the change in the instrument is by spoliation; that is, an alteration done, which is the act of a third person, or the result of accident.²²

A change in the duties of the principal will release the surety who has given a bond for the due performance of the duties of the principal's office.²³ So any alteration in the contract which increases the responsibilities of the principal debtor will discharge the surety on the original contract.

An extension of time given by the creditor to the principal, without the surety's knowledge and consent, is a frequent ground for claiming a discharge, both because of the alteration of the contract and because the risk of the surety is thereby increased.²⁴ But the law requires the extension agreement to be founded on a proper consideration, in order that it work a release.²⁵ And the granting of additional time could not be held to discharge the surety where the surety has been fully indemnified against loss by the principal's putting him in possession of property sufficient to pay the debt.²⁶ The holder of a guaranteed note does not discharge the guarantor by taking collateral security of the maker without extending the time. Taking additional security does not weaken the original contract, nor take from the grantor any advantage.²⁷ It could only be a benefit.

²² *Murray vs. Graham*, 29 Iowa, 250.

²³ *National Mechanics Banking Ass. vs. Conkling*, 90 N. Y., 116.

²⁴ *Bowmaker vs. Moore*, 7 Price, 223.

²⁵ *Robinson vs. Dale*, 38 Wis., 330.

²⁶ *Chilton vs. Robbins*, 4 Ala., 223.

²⁷ *Sigourney vs. Wetherell*, 6 Metc., 553.

SECTION 33. ALTERATION DOES NOT ALWAYS DISCHARGE THE SURETY.

Not every alteration of, or addition to, a written instrument operates to release the surety. The Indiana Court has held, that in a case where a guarantor executed an instrument reading: "We hereby guarantee," upon the understanding that other guarantors were to be secured; which understanding was not fulfilled, and the instrument was altered before the delivery of the same was made to read: "I hereby guarantee," the alteration itself was held not to be material.²⁸ The Maine Court has held that the rule that the surety is discharged by the alteration of the contract would not apply where the attesting witness saw the note signed, and afterward without the maker's consent, and at the request of the payee, witnessed it, no intent to defraud being shown.²⁹ A surety cannot claim a discharge where he ratifies the alteration, or where after he learns of the alteration he procures an extension of time of payment of the obligation.³⁰ So a surety may consent in advance to the alteration, and the consent would take away his right to claim the release on account of the after effected change.

SECTION 34. THE CREDITOR'S FRAUD.

If the creditor makes a false representation of fact concerning his contract relation with the debtor, which materially affects the transaction had with the surety, and it is the inducement of the surety's contract, or deceives the surety as to the extent of the contract liability he is assuming, it is a fraud on the surety, and the surety as a general rule is not bound on the obligation he has so undertaken.³¹

²⁸ Kline vs. Redmond, 70 Ind., 271.

²⁹ Milberry vs. Stover, 75 Me., 69.

³⁰ Bell vs. Mahin, 69 Iowa, 408.

³¹ Armstrong vs. Cook, 30 Ind., 22.

A surety may claim a discharge, by showing that he made his contract with the creditor on condition that another surety be procured, and that the condition of his signing was not complied with.²³ While the fraud of the creditor will usually discharge the surety, the fraud of the principal debtor on the surety will not discharge the surety on his contract with the creditor, unless the creditor participates in the fraud, or was, in some way, concerned in the perpetuation of the fraud or had a knowledge of the same. Where the obligee is without notice, however, the surety cannot interpose the principal's fraud as a defense to his contract.²⁴

The surety may as well avail himself of the fraud perpetrated on his principal as on himself, where he becomes the surety or guarantor of the debt, that was induced by a fraud perpetrated on the principal debtor, as defenses that are inherent in a thing cannot be wiped out by the obligee obtaining a surety for the obligation; the defense of fraud is therefore available to the surety in such a case.²⁴

The rule as to whether concealment of a certain fact by the creditor from the surety will amount to fraud, has been stated in substance as follows: in order that a failure to communicate a fact to the surety in respect to the subject matter of the proposed contract should have the effect of fraud upon him, and vitiate the contract, it must be a fact which necessarily must have the effect of increasing the responsibility of the surety, or operating to the prejudice of his interest.²⁵ Concealment or failure to disclose has been held to be fraudulent, only when the duty rests on the

²³ *Bellville Savings Bank vs. Borne-*
man, 124 Ill., 200; *Crawford*
vs. Foster, 6 Ga., 202.

²⁴ *Ladd vs. Board of Trustees*, 80

Ill., 233.

²⁵ *Putman vs. Schuyler*, 4 Hun.,
166.

²⁶ *Comstock vs. Gage*, 91 Ill., 328.

person having the knowledge of the facts to disclose them."²⁶

The case of *Warren vs. Brand* decided by the West Virginia Court ²⁷ gives a general review of the authorities as to when concealment of a fact by the creditor from the surety is to be regarded as a fraud on the surety. They say in conclusion, in part: "Our conclusion is that unless inquired of by the surety, a creditor is under no obligation to disclose the facts in no manner connected with the business which is the subject of the suretyship, though such facts would probably have a decided influence on the surety in entering into, or declining to enter into, his contract of suretyship. As, for example, in the taking of a bond of a cashier, the fact that the cashier gambled largely might, and probably would, influence a surety in going on the bond, yet such fact not being in any manner connected with the contract that he would faithfully perform his duties as cashier, the directors are under no obligations to volunteer a disclosure of this fact to the surety. If a material fact connected with the contract of suretyship, which might influence the surety in entering into the contract, is fraudulently concealed with a view to benefit the creditor, such concealment, though no inquiry is made by the surety, would vitiate the contract of suretyship and discharge the surety."

Where the surety's bond is given for the faithful performance of the duties of a person in the employ of the obligee, and the principal has been found by the obligee to be dishonest in his work, and he continues the dishonest servant in his employ without giving notice to the surety, he cannot hold the surety liable

²⁶ *Domestic Sewing Machine Co. vs. Jackson*, 15 B. J. Lea., 418.

²⁷ 15 W. Va., 21.

for subsequent losses he may meet with, by reason of the subsequent defaults of the servant.³⁸

SECTION 35. RIGHTS AND REMEDIES OF A SURETY AGAINST THE CREDITOR.

What is said under this heading might be included in a discussion of defenses that are available to the surety on his contract with the creditor. As additional defenses it may be mentioned, first, the right of a surety to claim the right of set-off available to the principal, in a suit brought against the principal by the creditor. As to the right of the surety to so plead a set-off that exists in favor of his principal, as against the creditor, there is a conflict of opinion, but it is generally held that the defense is available.³⁹ In reason, it seems that at least where the principal and surety are both parties to the suit there could be no valid objection to the surety insisting on the right to so claim the benefits and defense of the principal's set-off. Where, however, the principal was not a party to the suit, it is claimed that he, the principal, stands to suffer a loss for more than the surety was liable for on his, the principal's, right to bring a separate suit against the creditor on the matter claimed and set-off, and that this right would be lost by the surety setting it up as his defense to his liability to the creditor. A further right given by the courts to a surety is the right to compel the creditor to proceed to collect the debt from the surety, provided the proper indemnity bond is given to protect the creditor. This right of the surety is usually claimed by him by filing a bill in chancery, with the object as stated in view.⁴⁰ Though

³⁸ *Sanderson vs. Aston* Law Rep., 8 Exch., 73.

³⁹ *Himrod vs. Baugh*, 85 Ill., 435;

Becker vs. Northway, 44 Minn., 61.

⁴⁰ *Hays vs. Ward*, 4 Johns Ch., 123.

these are in the minority, some authorities hold that the surety after the debt has matured, by making to the creditor an express request to sue the principal, if the principal is still solvent, may relieve himself from liability, if the creditor does not sue, and the principal subsequently becomes insolvent.⁴¹ Sometimes a formula such as the above is prescribed by statute; a compliance with the statutory provision would then release the surety, where the creditor fails to act, and the financial condition of the principal is thereafter altered. The majority of the courts have failed to follow this so-called equitable rule where they have no corresponding statutory regulation, though it has been approved by many states, by legislative enactment, and it may be considered at any rate a reasonable and equitable rule of law, where in force.

It is a further general rule of law, in this connection, that the surety may claim a discharge, if the creditor leads him to believe that the principal's debt is paid, and it is not, and the surety is injured thereby by releasing securities held by him, or by failing to take the proper steps to protect himself, that he might have taken, except for the representation of the creditor.⁴²

SECTION 36. RIGHTS AND REMEDIES OF SURETY AGAINST THE PRINCIPAL.

If the principal debtor defaults on his contract, thereby making the surety liable, and the surety makes payment of the debt that he is so bound to pay, the law gives the surety, immediately on his payment of the debt, a right of action over against the principal for the amount of money he has so paid out.⁴³

⁴¹ *King vs. Baldwin*, 17 Johns, 384.

⁴² *Rowley vs. Jewett*, 56 Iowa, 492;
Baker vs. Briggs, 8 Pick., 122.

⁴³ *Campbell vs. Rotering*, 42 Minn., 115.

There is no need of an express promise on the part of the debtor to indemnify the surety; the promise is implied by law.⁴⁴ And part payment of the debt only will give the surety a right to sue for the partial payment made, but no right of action accrues until the surety makes payment to the obligee of the debt, either in whole or in part.⁴⁵ An express stipulation by the principal debtor that he will indemnify the surety, as by the giving of a bond of indemnity, would limit the surety to his right to be indemnified to the express contract as stated in the indemnity bond; it would nullify the implied promise so far as anything outside the bond is concerned. Merely taking security for the principal's debt, however, would not have this effect; the security taken would be considered cumulative. The right of the surety to sue the principal for indemnity is not affected by the fact that the principal did not join in the execution of the bond signed by the surety, even though it was agreed the principal was to sign.⁴⁶

If the surety makes payment of his obligation by delivering his own note, and it is received as payment of the debt, he may sue the surety at once, the same as if the debt was paid to the creditor in cash. And it would make no difference if the surety himself afterward defaults in the payment of his note.⁴⁷ But the surety will never be permitted to make a profit of his payment of the obligation for which he is surety on the default of the principal; the most that he can claim is reimbursement for the money he has actually paid out, with legal interest and the costs he has rea-

⁴⁴ *Martin vs. Ellerbee's Admr.*, 70 Ala., 326.

⁴⁵ *Harper vs. McVeigh*, 82 Va., 75.

⁴⁶ *School Trustees vs. Sheik et al.*, 119 Ill., 579.

⁴⁷ *Peters vs. Barnhill*, 1 Hill Law (S. C.), 237.

sonably been subjected to, and which he has paid out in good faith. So if he makes payment in something other than money, as in personal property of any kind, or he makes payment in real estate, he can only recover the actual value of the property he has turned over to the creditor.

On the right of indemnity, the surety can only recover for the amount he has paid out, and, moreover, he can recover nothing for other damages or sacrifices he may be obliged to make incidental to the principal's default.⁴⁸ To hold otherwise would open the road to fraud and collusion, the courts have declared repeatedly.

"A surety, after the debt has become due, may, without having made payment himself, come into a court of equity and compel the principal to pay the debt, making the creditor a party, that he may be at hand to receive the money."⁴⁹ The surety stands in the position of an assignee, and may use the remedies of the creditor, at his own risk and cost, however. The above is the statement of the legal principle by the Illinois Court. This principle as stated is one of supreme recognition, and is another of the surety's means of relief from a situation that is usually a difficult one. A surety cannot generally recover indemnity from his principal, where he pays a debt for which the principal is not liable, and so also he could not claim indemnity where at the time of payment he has knowledge of facts which would discharge himself or his principal.⁵⁰ But where the surety pays the debt, not having knowledge that the consideration for the same had failed, he may still claim indemnity.⁵¹

⁴⁸ Vance vs. Lancaster, 3 Haywood (Tenn.), 130.

⁴⁹ Moore vs. Topliff et al., 107 Ill., 241.

⁵⁰ Noale vs. Blount, 77 Mo., 235.

⁵¹ Gasquet vs. Oakley, 19 Ia. (Curry), 76.

**SECTION 37. THE RIGHTS AND REMEDIES OF A SURETY
AS TO CO-SURETY.**

Where there is more than one surety obligated for the debt of the principal, the creditor may proceed to collect all of the debt from one of the sureties only. This being true, and since the equitable maxim would compel the remaining sureties to make the obligation an equal one between them, we find the main question between co-sureties is the question of contribution. This equitable right has now been fully recognized by the law courts, and a court of law, now, is the usual forum for seeking such a remedy, except in the case where the law court could not give a full and adequate relief. The remedy then would be sought in a court of chancery. Contribution can be enforced by the surety who paid the debt in an action under the common courts.⁵³ Co-sureties are held bound for contribution even though they are become sureties by different instruments, and the law does not release a surety from contribution simply because one surety did not know that the other was also bound to answer for the same debt.⁵⁴ A surety for other sureties cannot be considered their co-surety. So where one signs as "security for all prior parties," it was held there could be no contribution between him and the other sureties,⁵⁴ but the law will permit the true relation between the several sureties to be shown by parol, in any event, and contribution will be allowed where they are shown to be co-sureties.

It is the general rule that one of several co-sureties is entitled to the benefit of indemnity secured by

⁵³ *Porter vs. Horton*, 80 Ill. App., 333.

⁵⁴ *Singer Mfg. Co. vs. Bennett*, 28 W. Va., 16.

⁵⁴ *Chaffee vs. Jones*, 19 Pick., 260.

another, if this indemnity is received after all have signed and previous to the payment of the debt, and this is the rule even though the surety obtained the indemnity through his individual efforts and it was intended for his benefit alone.⁵⁵ Indemnity, however, given to one surety, does not always inure to the remaining co-sureties; this would be true where the indemnity is furnished by a stranger.⁵⁶ A surety may, before he pays the debt, file a bill in chancery to compel his co-sureties to contribute to him; he may also ask to have them restrained from transferring their property, where a proper showing is made,⁵⁷ so that his remedy to exact contribution will not be lost.

SECTION 38. WHEN SURETY'S ACT DISCHARGES CO-SURETY FROM CONTRIBUTION.

It is the rule that where one surety obtains security for his indemnity before he became bound on his obligation, or wherever indemnity obtained by him would inure to his co-sureties, he, the surety, is bound to protect such security for his co-sureties, and if by his act the security is lost, his co-sureties are relieved from their liability to make contribution to him, to the extent to which they are injured; so where a surety by his own negligence loses the security of a lien on certain property, he thereby releases his co-sureties from contribution to the extent of the lien so lost.⁵⁸

SECTION 39. IN WHAT PROPORTION CO-SURETY BOUND TO MAKE CONTRIBUTION.

In an action at law, a surety can only recover of his co-sureties, solvent or insolvent, an aliquot part

⁵⁵ *Steele vs. Mealing*, 24 Ala., 285;

Miller vs. Sawyer, 30 Vt., 412.

⁵⁶ *Leggett vs. McClelland*, 39 Ohio

St., 624; *Lacy vs. Rollins*,
74 Texas, 563.

⁵⁷ *Bowen vs. Haskins*, 45 Miss., 182.

⁵⁸ *Smith vs. Coulter*, 6 Minn., 493.

of the debt based on the whole number of sureties. This is the rule where the sureties are all liable for an equal amount. But in equity he may recover of the solvent co-sureties a pro rata amount of the money paid by him, on the basis of the number of the solvent sureties, excluding in computation the insolvent co-sureties.⁹⁹ Where the co-sureties are liable for varying sums they are bound in contribution, in proportion to the sums, for which they are bound.

SECTION 40. THE EQUITABLE RIGHT OF SUBROGATION.

The application of the doctrine of the equitable principle of subrogation is a frequent one. The rule is stated by the Illinois Court as follows: "It seems to be a well settled principle in equity that a creditor who has the personal contract of his debtor, with a surety, and takes property from the principal, as a pledge or security for his debt, should hold the property for the benefit of the surety, as well as himself, and if he parts with it without the knowledge or against the will of the surety, he shall lose his claim against the surety to the amount of the property so surrendered. A surety who pays the debt is entitled to be put in the place of the creditor, and to all the means, and to every remedy, which the creditor possesses to enforce payment from the principal debtor. Property so taken by the creditor is held in trust by the creditor, not only for the creditor's security, but for the surety's indemnity, and these rules of equity are recognized and enforced in courts of law."¹⁰⁰

The rule as given above is of universal application, and to perfect his right to the privileges of subrogation,

⁹⁹ Newton vs. Pence, 38 N. E. Reporter, 484.

¹⁰⁰ Kirkpatrick vs. Houk, 80 Ill., 125.
This case cites the case of

Neff's Appeal, 9 Watts & Serg., 36; 2 American Leading Cases, 5th Edition, 403.

the surety is in no way bound to signify his intention to avail himself of the right; the circumstances of the surety's position create the right; he can lose it only by waiving his right to it, or delaying unduly his claim to the same; that is, by being guilty of laches. A surety ought to use due diligence in asserting his claim to subrogation. The right of subrogation does not arise to one who pays the debt of another as a mere volunteer, that is, one who pays without being liable to pay.⁶¹ A surety ordinarily is not entitled to subrogation until the whole debt is paid, but the payment may be in part by the principal, and in part by the surety. The learned jurist, Marshall, has remarked in passing on the right of a surety to be subrogated to the creditor's rights against his co-surety, holding that he had such right; he spoke as follows: "Where a person has paid money for which others are responsible, the equitable claim which such payment gives him on those who were so responsible, shall be clothed with the legal garb with which the contract he has discharged was invested, and he shall be substituted to every equitable intent and purpose in the place of the creditor whose claim he has discharged. This principle of substitution is completely established in the books, and being established, it must apply to all persons who are parties to the security, so far as is equitable. The cases suppose the surety to stand in the place of the creditor as completely as if the instrument had been transferred to him, or to a trustee for his use. Under this supposition, he would be at full liberty to proceed against every person bound by the instrument. Equity would undoubtedly restrain him from obtaining more from any individual than the just proportion of that indi-

⁶¹ *Suppinger vs. Garrels*, 20 Ill. App., 625.

vidual; but to that extent his claim upon his co-surety is precisely as valid as upon his principal.”⁶³

SECTION 41. SURETY SUBROGATED TO LIEN OF JUDGMENT AGAINST PRINCIPAL.

Prior to the passage of the Mercantile Law amendment,⁶⁴ the holding in England was that the payment of a judgment, even by a surety, extinguished the judgment. But by this act the right was given to the surety, who paid the debt of his principal, to have assigned to him, or to a trustee for him, every judgment specialty, or other security which shall be held by the creditor in respect of such debt, or duty, and such person shall be permitted to stand in the place of such creditor, and to have all his remedies, and if need be, to use the name of the creditor in any proceeding at law or in equity to recover his indemnity against the principal debtor. In the United States the generally accepted principle in this regard is, that where a surety pays the judgment, whether it is a joint judgment against both surety and principal, or whether it is a judgment against the principal alone, he is entitled to be subrogated to all the rights and lien of the creditor on account of the judgment.⁶⁵ And it is held that if the creditor's judgment is against several co-sureties the surety who pays such judgment will be subrogated to the creditor's rights on such judgment as against his co-sureties.⁶⁶

SECTION 42. CONVENTIONAL SUBROGATION.

Equitable subrogation is to be distinguished from conventional subrogation which arises when the surety

⁶³ *Lidderdale vs. Robinson*, 2 Brock., 159.

⁶⁴ Statutes 19 and 20 Vic. C., p. 7 S., 5

⁶⁵ *Lumpkin vs. Mills*, 4 Ga., 343; *Hill vs. King*, 48 Ohio State, 75.

⁶⁶ *Smith vs. Rumsey*, 33 Mich., 183.

is substituted in the place of the creditor, by agreement. This latter kind of subrogation may give the surety greater rights than he could claim without the agreement, as it may afford to the surety a chance, in a way, to speculate on the transaction, as for instance he may pay the debt before it matures, the creditor agreeing in consideration of early payment to take less than the whole, and to transfer the debt to the surety, and in such case on maturity of the obligation the surety may collect the entire amount.

SECTION 43. EQUITABLE CONTRIBUTION.

Among the remedies allowed to the surety, that of equitable contribution must not be overlooked. A leading case on this principle is that of *Wolmerhausen vs. Gullick*,^{**} reported as late as 1893. In that case it is said there is on this question a remarkable absence of express authority. In that case, one of the sureties was called upon to pay the debt, and before payment she sought by bill in equity to invoke the doctrine of equitable contribution, that is to compel payment by the co-sureties, of their proportionate share of the debt, before she had paid the debt herself. The defense was that the plaintiff was not entitled to contribution, having paid nothing on account of the debt herself. The plaintiff insisted, she was willing to pay her proportion, but insisted actual payment of it was not necessary as a condition precedent to her right to contribution, on the showing that present payment of the whole debt by her would greatly embarrass her in her business investments, namely, by a withdrawal of the money necessary to pay the debt, even though the money was to be used for a short time only.

^{**} L. R., 2 Ch., 314.

"Obviously if a man were surety," the court says, "with nine others for ten thousand pounds, it might be a ruinous hardship if he were compelled to raise the whole 10,000 pounds at once and perhaps to pay interest on the 9,000 pounds by actions or debtor summons against his co-sureties." After a review of the authorities, showing that contribution is founded purely in equity and not in contract, the court said in substance that had the creditor been made a party to the suit, that the plaintiff would then have had a right to have had the court decree that the solvent co-surety pay his proportion to the principal creditor. The court then proceeded to declare the plaintiff's rights and made a prospective order under which the plaintiff would have the right to hold the co-surety for any sum paid over her proportionate share, and further that on the plaintiff paying her own share, that the defendant is to indemnify her against further payment or liability, and that the defendant is by payment to her, or to the creditor, to thereby exonerate the plaintiff from liability beyond the extent of her own share.

It would seem then that the right of the so-called equitable contribution is firmly established, unless the courts are to take a backward step.

CHAPTER V.

LIABILITY AND RIGHTS OF THE GUARANTOR.

SECTION 44. CONTRACT OF GUARANTY.

The distinctions between the contract of the surety and the guarantor have already been observed in section four of this text, and it will be remembered that the guarantor's contract is both a collateral one, and also a secondary one to the principal's contract, the guarantor's promise usually amounting to this, that he will answer for the principal's default, provided the principal does not respond, and the creditor observe the rule of due diligence, the use of which the creditor is bound to undertake in accordance with the terms of the contract. In addition to this, it may be said the guarantor's contract being a secondary one, it requires a special consideration to support it; the principal's contract is not the guarantor's. The guarantor must therefore have notice of the principal's default, and good faith requires that the creditor who fails to give such notice is acting at his peril. The guarantor can claim a discharge to the extent of the injury he suffers, by reason of failure to receive notice, where the lack of notice of default on the part of the creditor materially affects him in his rights under the contract.

SECTION 45. CLASSIFICATION OF GUARANTIES.

Guaranties are said to be either special or general, in accordance with language used by the guarantor in offering himself as a guarantor. The guaranty is considered as special where, for instance, the offer is

to be responsible for the obligation of another and is directed to some particular person or firm only. Therefore if on a guaranty made by X to A & Co. on future contracts of purchase made by Y of them, the firm of B & Co. acts and gives credit to Y on the strength of the guaranty to A & Co., the firm of B & Co., on default of Y, could recover nothing of X on his guaranty to A & Co. The guaranty is special to the persons made; there can be nothing inferred from such an agreement to give any one, but the person to whom it is directed, the right to treat it as an offer of guaranty.¹ But the right of action, once fixed on a special guaranty, may be assigned to another person,² and recovery had on the assignment.

Where the offer of the guarantor is not directed to any particular person, and no limitation is shown of an intention to confine it as an offer to any particular person, one who acts on it may recover, as the offer will be deemed to be made generally. But the courts in passing on such a state of affairs, for the purpose of ascertaining the intentions of the party making such an offer, as is said in a leading case, "will look at the situation of the parties making it, the subject matter of the contract, the motives of the parties entering into it, and the object to be attained by it; and even in the case where the contract is reduced to writing will allow all these circumstances to be shown by parol evidence, if the intent of the parties upon the face of the contract is doubtful, or the language used by them will admit of more than one interpretation."³ Where the contract to be entered into on behalf of another, was shown to be intended as addressed or communi-

¹ Taylor et al. vs Wetmore, 10 Ohio, 491.

² Robbins vs. Bingham, 4 Johns, 476.

³ Lowry vs. Adams, 22 Vt., 160.

cated generally, the resulting contract would be that of a general guaranty. A contract of guaranty may be retrospective if it can be shown that by the use of express words, or by necessary implication such a contract was intended.⁴ But words of general import will not be construed as retrospective although susceptible of such meaning, the language employed must, by express words, include the past indebtedness,⁵ or defaults previous to the time of the making of the guaranty. As to whether a guaranty is to be considered a limited, or a continuing guaranty, it is not always easy to say, since there may not be a positive statement of intention shown, and it is rare that in guaranty contracts the language of the instruments is such as to make the decision upon one contract an exact authority for that to be made on another. In *Mason vs. Pritchard*,⁶ the words of the guaranty were "to be responsible for any goods he hath, or may supply my brother with to the amount of 100 pounds," the court was of the opinion, it was a continuing guaranty, or standing guaranty to the extent of 100 pounds, which might at any time become due for goods supplied until the credit was recalled. And in the case where the language was: "I consider myself bound to you for any debt he (my brother) may contract for in his business as a jeweller, not exceeding 100 pounds, after this date," Lord Ellenborough held it a continuing guaranty for any debt not exceeding 100 pounds which the brother might from time to time contract with the plaintiffs in the way of his business; and that the guaranty was not confined to one instance but applied to debts successively renewed. On the other hand, in the case of *Rogers vs. Wainer*,⁷ where the words

⁴ *People vs. Lee*, 104 N. Y., 441.

⁵ *Morrell vs. Cowan*, L. R., 7 Ch. Div., 151.

⁶ 12 East, 227; S. C., 2 Camp., 436.

⁷ 8 Johns, 119.

used were "If A & B, our sons wish to take goods of you on credit, we are will to lend our names as security for any amount they may wish," was held to be a limited guaranty for a single credit.

There is no general rule for determining whether a guaranty is a continuing one or not. Where the duration of the continuation of the guaranty is not specified, it will be construed to mean to run for a reasonable length of time; the facts and circumstances attending the particular case are to be taken into consideration. Unless the terms of a continuing guaranty state that it may be revoked at any time, by the guarantor giving notice that he is not to be bound for liability thereafter accruing,⁸ and unless the guarantor has bound himself for a definite term, notice of death coming to the creditor will revoke the guaranty.⁹

SECTION 46. SUBJECT CONTINUED. ABSOLUTE AND CONDITIONAL GUARANTIES.

If the promissor's liability depends upon the performance of some other event, or the meeting of some other contingency, other than the performance by the principal of his contract, the guaranty is said to be a conditional guaranty. The guaranty is styled an absolute guaranty when the default of the principal fixes the liability of the guarantor. An indorsement of a promissory note, in the form of a guaranty, is the most common form of the absolute guaranty.¹⁰

Conditions of demand on the principal, or notice of default, ordinarily are not a part of the contract of the absolute guarantor.

The most lucid example of a conditional guaranty

⁸ Gay vs. Ward, 67 Conn., 147.

⁹ Pond vs. U. S., 111 Fed. Rep.,
989.

¹⁰ Gage vs. Mechanics Natl. Bank,
79 Ill., 62.

is in the case of the guaranty of the collectibility of note or other indebtedness. In such a case, it is essential that something be shown beyond the mere default of the principal. The creditor must show due diligence in an endeavor to collect, which is the condition of the guarantor's contract, and unless this condition of the contract is met, then the guarantor is exonerated. The creditor must usually show that the demand cannot be collected by legal proceedings, that is, by instituting suit, securing a judgment, and by having a return showing execution on the judgment can not be made, as the creditor is bound also to enforce the legal remedies given him against the debtor.¹¹ Any form or words that fairly import the condition that the creditor shall first exhaust his remedies against the principal debtor, is sufficient to make the guaranty a conditional one, as for instance where the language is "I warrant this note good."¹²

SECTION 47. CONSIDERATION.

Since the guarantor's contract is usually collateral, and secondary to the principal's, a separate consideration is required to support the same. The consideration may move from either the principal, or the creditor to the guarantor. Where the guarantor's contract is made simultaneously with the principal's, one consideration may answer for the two,¹³ and the law only demands that there be a benefit or some consideration arising to the principal, although there is nothing to prevent the guarantor from also reaping a reward for the risk he undertakes under his contract of guaranty.

¹¹ *McMurray vs. Noyes*, 72 N. Y., 524.

¹² *Hippach vs. McKeever*, 166 Ill., 136.

¹³ *Curtis vs. Smallman*, 14 Wend. (N. Y.), 231.

As to forbearance operating as a sufficient consideration, the courts of the United States generally adhere to the rule that mere forbearance alone is not sufficient to support the guarantor's contract, but that an agreement to forbear as well is essential,¹⁴ but it seems the English Courts hold that actual forbearance coupled with a request is alone sufficient to support the contract,¹⁵ notwithstanding there was lacking the promise to forbear.

The consideration must not be the doing of something that is against public policy, as this would render the contract itself illegal.

SECTION 48. NOTICE TO GUARANTOR OF PRINCIPAL'S DEFAULT.

Where the guaranty is absolute, there is no ground for the guarantor's plea of a right to demand notice of the principal's default. By the terms of his contract the possible default is fixed, and his not receiving notice of the same, puts no extra burden on him, as the date for the fulfillment of the contract already being known to him, he may make his plans accordingly. But the case of the conditional guaranty furnishes a different situation, and in the following cases notice of default is held necessary. First, where the contract contains the express condition that notice of default shall be given; a failure to give notice, in such a case, would discharge the surety, without his showing any injury resulting therefrom. Second, demand and notice are necessary where the guarantor's liability rests or is dependent on knowledge peculiarly within the power of the creditor or

¹⁴ *Welbe vs. Romond Oolitic Stone Co.*, 58 Ill. App., 226.

¹⁵ *Grears vs. Hunter*, 19 Q. B. Div 341.

depending on his option; as where the determination of some question, such as the solvency of the principal, is to be looked to by the creditor. An example of this class would be a guaranty of the collectibility of a debt.¹⁶ The protection to the guarantor is the receiving the notice that the guarantor is in default, the creditor having endeavored to make collection through the legal remedies given him with no success; this protection is accorded the guarantor by showing him that the conditions of his contract have been fulfilled, and that he must meet the terms of his contract. The third class of cases in which notice is necessary is found in those that grow out of continuing guaranties of payment for advances to be made from time to time, as under a general letter of credit. A guarantor will not be held liable where, having made himself a guarantor, and having been accepted as such, and goods are sold under the guaranty, but no notice was given of the amount so sold to his principal, nor of the default in payment by the principal, until two years had gone by, and the principal had become insolvent.¹⁷ Whenever the determination of the amount to be paid on a guaranty for an uncertain sum is a matter over which the guarantor has no control, the duration of the guaranty being fixed, the guarantor is always entitled to notice.¹⁸

SECTION 49. LIABILITY OF THE GUARANTOR.

The liability of the guarantor having been fixed, either by default of the principal in the case of an absolute guaranty, or by the creditor meeting the conditions of the conditional guaranty, then the

¹⁶ *Bashford vs. Shaw*, 4 Ohio St., 467.

¹⁷ *Courtis vs. Dennis*, 7 Metc. (Mass.), 510.

¹⁸ *Clark vs. Remington*, 11 Metc. (Mass.), 361.

guarantor is bound; his liability is as great and no greater than the terms of the contract show. The liability of the guarantor once having been fixed, the guarantor is then situated as a surety would be, and his rights under the contract, as well as his liability, would be controlled by the same principles that control the surety's position, who finds himself bound to answer for the debt or default of another. "As a guaranty is regarded as a mercantile instrument, it is not to be interpreted by any strict technical rules of construction," says the Virginia Court, "but by what may fairly be presumed to have been the intention and understanding of the parties."¹⁹

What has been said, then, of the liability of a surety, and of his peculiar rights and privileges, applies, in great part, to the guarantor, as guaranties are simply a branch of the law of suretyship, and are governed by the same principles, for the most part.

SECTION 50. IS A GUARANTY OF A NOTE NEGOTIABLE?

Where the guaranty is general, that is, addressed to all persons, any person who acts upon it may enforce it. This principle has already been stated, the law creates the privity of contract between the person so offering himself as a guarantor, and the person who accepts the offer so made. It has been held that where there is a general guaranty of negotiable paper, the indorsee of such paper acquires the benefits of the guaranty, without a special assignment of the guaranty being made to him.²⁰ But the general question remains, is this general guaranty of negotiable paper to be considered as passing to the indorsee the same

¹⁹ Moore vs. Holt, 10 Gratt. (Va.), 284.

²⁰ Ellsworth vs. Harmon, 101 Ill., 274.

rights that he would acquire by an indorsement? This question is answered in the negative, the guarantor having as against an indorsee of the paper after maturity at least the same defenses as the makers against the original payee.²¹

A special guaranty is not even assignable, until the right of action has accrued on the same.²² Any other rule would rob this kind of a guaranty of its limitations; a substitution of one in the place of the one, to whom the trust is implied, would lack the necessary privity of contract to bind the promissor.

Where the payee or holder of negotiable paper transfers the same, and instead of making a regular indorsement, he writes over his name a contract of guaranty, some courts hold that such a transfer is nothing more than a mere assignment, and that the negotiability of the paper is thereby destroyed. There is, on the other hand, the decided weight of authority to the effect that where a transfer is made, accompanied by a contract of guaranty, that this kind of an indorsement does not destroy the negotiability of the contract.²³ In reason, it would seem the writing of the guaranty over the name of the transferrer, while it would deprive the guarantor from the full privilege of notice, that the indorser can always claim, such a change in the obligation ought to have no more effect on the matter of negotiability, than an indorsement "without recourse," and that confessedly does not affect the negotiability of the paper in any way.

²¹ Central Trust Co. vs. National Bank, 101 U. S., 63.
²² Evansville Natl. Bank vs. Kauffman, 93 N. Y., 273.

²³ Russell vs. Klink, 53 Mich., 161;
 Hatcher vs. Natl. Bank, 79 Ga., 542.

CHAPTER VI.

BONDS AND BAIL.

SECTION 51. BONDS IN GENERAL.

A bond is an instrument in writing and under seal, binding the obligors to the obligee, in accordance with the recitals of the terms of the contract, and containing a defeasance clause showing the limitations or conditions of the liability of the sureties. The bond may be the obligation of both the principal and the sureties; where the principal is also a party to it the bond must be executed by both surety and principal. The obligee must be named with certainty; delivery of the bond to a particular person would not take the place of naming him as the obligee for whom the bond was intended. The bond is usually spoken of as an instrument of great formality, but the instrument will still be a valid bond even though the language is not in the most desired form, if the essentials of reciting the debt, with the obligation to answer for the same, together with the defeasance clause, that is, the conditions under which the bond is to be considered void, are given. A bond does not become effective until a delivery of the same is made, and an acceptance had by the obligee.

Bonds may be given for the faithful performance of the duties of a person acting in a private capacity, as on a contract with another private person; these are private obligations. The bond of a public official is styled an official bond; the obligation of the official to give a bond arises by rule of the statute; there is no

rule of the common law demanding the giving of such a bond.

Judicial bonds, are those which the law requires parties litigant to give in judicial proceedings for the protection of other persons, who it is deemed may suffer an irreparable injury without the exacting of such bonds. If it were not for these checks on the right of all persons to invoke the compelling power of the courts, there would undoubtedly be much abuse of the privilege to bring to court any one who it is claimed owes to the individual an unfulfilled duty. The value of the rule making it necessary to give bond, either in the institution of the suit, or in the course of the review of the judgment on the same, is in its power to compel the litigants to exercise good faith in their appeal to the courts for justice.

SECTION 52. BONDS FOR THE FULFILLMENT OF PRIVATE OBLIGATIONS.

Bonds given for the fulfillment of private obligations, are purely the result of the contract that the individuals concerned, may make. If it is a bond, for instance, given to save harmless some certain employer from any act of dishonesty or default of his employe, this contract is controlled entirely by the parties to it; the bond may be for a large or small sum; its time of commencement and its duration both depend on the terms of the contract. It is a voluntary obligation and no rule of statute controls the entering into such a bond. Bonds given to secure voluntary contracts are to be distinguished from bonds given for the performance of the duties of a public office, such as a sheriff's bond, or the bond given by the holder of the office of the county treasurer. The strict fulfillment of the obligations named to be performed in a private

bond may be waived; the parties to such a contract say whether or not they are satisfied to cancel such a bond; where there has been a breach of the same, the law can ordinarily offer no dictation. The general rules of law of suretyship and the usual rules of construction govern in the matter of bonds given for the performance of a private obligation.

SECTION 53. BONDS OF PUBLIC OFFICERS.

The statute, or the law that creates an office, usually names the duties appertaining to the office. The official himself has no power to change the duties of his office, or to compel the State to accept a bond, where one is required conditional for the fulfillment of the duties of the office, in any other way, than as the law dictates. Nor can any other officer of the State or government ordinarily change or modify the duties of the office, or waive the right to claim a performance by the officer of his full duty. The relations of the officer to the State are official, and not contractual. This opens the way for important distinctions to be made between the contract rights and obligations of those who agree to answer for the defaults of private agents, and those who answer for public officers.

Some of the provisions of the statute in reference to official bonds are directory only, and a failure to comply with the provisions would not have the effect of invalidating the bond, so as to release the surety, nor could an error or omission made in approving the bond, be shown as a defense on the same.¹ And it has been held that a failure to file the bond within the time named by the State, would not release the surety.

These provisions of the statute are made to furnish the greater protection to the public; they are not

¹ Mowbray vs. State, 88 Indiana, 324.

intended to aid the surety in using them as a defense to his liability on the bond, after it is given. Where a bond is given voluntarily by an officer, there being no statutory provision requiring that such a bond be given, the surety on such bond will nevertheless be held, if there is a consideration to support the contract.² The bond of a surety, given on behalf of a public official, usually has no retroactive effect, unless its terms so indicate. The bond usually takes effect when it is received and accepted, where the acceptance is a condition precedent to the officer taking his office.³

The liability of the surety on an official bond is usually limited by the terms of the bond to the obligations and duties of the office that are imposed by law, and the surety is not to be held liable for money received by the principal, coming to him outside the line of duties, as prescribed by the law.⁴ While the bonds of public officials are to be strictly construed, and while the surety shall not be liable for the performance of any duties or obligations except those named in the bond, it is still the rule, that sureties on official bonds are not discharged by a change in the duties of the office by statute, as it is deemed that the sureties signing the bond contemplate the possibility of changes being made in the duties of the office, provided the nature and general duties of the office remain the same. In this connection, Judge Woods, in the case of *United States vs. Gaussen*,⁵ remarks as follows: "Otherwise every increase in the duties, every change in the manner of conducting the office,

² *United States vs. Mason*, 2 Bond, 183.

³ *United States vs. Le Baron*, 19 How. (U. S.), 73.

⁴ *Sutherland vs. Carr*, 85 N. Y., 105.

⁵ *Ex'r*, 2 Woods, 92.

or rendering accounts or paying out the public money, would discharge the bonds of all the collectors of customs holding under the government." Where a second bond is given, during the term of office, where the law requires the giving of a further bond, which bond is to answer for the same duties and obligations, it is considered by most courts as a cumulative bond. The surety in the first bond is not discharged, on account of the giving of the further bond.⁶ The bondsman for a judicial officer, although he usually agrees to answer for the faithful performance of both the judicial and ministerial duties of such an officer, still could not be held liable for the consequences of an error of judgment of such an officer. The way in which purely judicial matters shall be handled is discretionary with the judicial officer, but all those acts that are to be performed in a particular way, that is, pointed out by the law, are purely ministerial. It is only for those acts that are of a ministerial nature that such an officer, or his surety, is liable for, and if in the performance of such acts, the officer commits a wrong, or abuses his authority, to the injury of another, the bondsman is liable.⁷

Sureties are presumed to know the duties of the public official for whom they sign as sureties, and could not plead ignorance of certain rules of statute in connection with handling of the fees of an office.⁸

SECTION 54. BONDS OF PERSONS GIVEN IN LEGAL PROCEEDINGS.

There are many situations that arise or present themselves in the course of the administration of justice where the law demands that one of the parties,

⁶ *Allen vs. State*, 61 Ind., 268.

⁷ *People vs. Harper*, 91 Ill., 357.

⁸ *Place vs. Taylor*, 22 Ohio State, 317.

before the doors of justice are opened to him, shall give a bond to save harmless the other party in case the action or proceeding contemplated, is such as may by its wrongful use, or abuse, bring an injury to the other party to the action. This contract, in the form of a bond, is treated like other contracts of suretyship and is governed by the same principles of law, and the surety in such an instance may also claim the special rights and privileges of his contract of suretyship. The appeal bond is naturally one of the first bonds that we would come in contact with in court proceedings. The surety in the bond, for an appeal, must not himself be liable for the judgment from which the appeal is taken. The principal appealing must be some one who has an interest in the judgment, or decree, sufficient to bring him within the law which entitles such a person to an appeal.⁹ An appeal bond, to be effective and binding on the bondsman, must be approved by the proper officer, to be placed on file.

One who is surety on an appeal bond is liable only for the particular judgment appealed from; where there is an interlocutory order of affirmance in the Appellate Court, reserving leave to answer and new pleadings are framed, and a new judgment rendered on the new issues, the surety cannot be held to pay such judgment.¹⁰

Unless a proper order is entered, permitting the appeal to be had, there is no authority to the clerk to receive the bond, and the surety on such a bond would not be liable.

There are many other cases where a bond may be given in the course of the administration of

⁹ *Fisher vs Hanna*, 21 Colo., 9.

¹⁰ *Poppenhausen vs. Seeley*, 3 Abb. Rep. Om. Cas., 615.

justice; as attachment bonds, release bonds, redelivery and forthcoming bonds in attachment proceedings, bonds given in the matter of securing an injunction, bonds given in the action of replevin, and certain bonds which may be termed statutory bonds, as being required by rule of statute in certain cases. These various bonds are required for the purpose of indemnifying the party drawn into the litigation, and for the purpose of paying the damages that may result, in case the order of court should be found to be wrong.

The bond, which the law requires as a condition precedent to the granting of an injunction, is usually the only recourse that the defendant has for the wrongful issue of the injunction writ, unless he can make out a case of malicious prosecution.¹¹ The action on the bond does not accrue, until it is finally determined that the injunction was wrongfully issued. The injunction bond is strictly construed; parol evidence will not be heard to remedy formal defects. All the other contract essentials, necessary to the usual bond, are of course also required.

The special remedy of attachment offers three different inducements for the giving of bonds, viz., the bond to procure the attachment itself, which bond is given as indemnity to the defendant, if the writ of attachment is wrongfully issued; the bond to release the property after it is taken on the attachment writ, which is given by the defendant to get possession of the property only, and the bond given to discharge the attachment, which bond obligates the bondsmen to make good to the plaintiff such judgment as the plaintiff may recover in his action.

The replevin bond is given to secure the writ of replevin; it must be given to give the court jurisdic-

¹¹ *Meyers vs. Block*, 120 U. S., 211.

tion; the conditions of such a bond are that the plaintiff will prosecute the action, and that he will restore the property, in case it is determined the writ was wrongfully sued out, and further, that the plaintiff will pay to the defendant the damages that he may suffer by reason of the writ, if it was wrongfully sued out.

SECTION 55. BAIL BONDS.

Bail bonds are given to secure the appearance of the person, usually styled the defendant, at the time and place named, when the defendant is to be surrendered to answer the charge for which he was originally taken into custody. In them there is a bailment of the defendant to his sureties, and the defendant is in their custody instead of going to jail, and remaining in the custody of the law. The sureties on a bail bond have, in general, the same rights as the ordinary surety, as, for instance, they have a right to claim a discharge by a change made in their contract without their giving their consent to the same. The limit of their liability is the amount named in the bond, with interest from the date the return of the execution writ *non est inventus* is made.¹²

The sureties on the bail bond will be discharged from liability by performing the condition of the bond; performance may be by surrender of the principal, or in civil cases by paying the debt of the principal.¹³

It is also held that the death of the principal at any stage of the suit, before the return of the writ against the principal, will discharge the surety. The bail bond sureties in criminal cases, always have the right to terminate their obligation by arresting, and sur-

¹² *Heustis vs. Rivers*, 103 Mass., 398.

¹³ *Appleby vs. Robinson*, 44 Barb. 316.

rendering the principal to the sheriff,¹⁴ and this may be done at the return term or in vacation, and it is held they may even pursue the principal into another State, for the purpose of arresting him. If the principal appears at the commencement of the trial, it is to be looked upon as a constructive surrender to the officer of court, and the liability of the surety is at an end.¹⁵ The principal, too, need not only appear at the time specified, but he must take notice of the actual day that the term of court commences, and a clerical error as to the day of the month would not govern.¹⁶ And if the bond reads that the principal must appear from day to day, he must fulfill the terms of the bond in order not to bring about a forfeiture.

A bail bond is to be given only by permission of court, and on the terms that the court may prescribe, as the granting of the permission to be bail is a judicial act. A voluntary tender of bail bond without the court's order sanctioning it, would be of no force or effect,¹⁷ and the order admitting to bail, must always be by the authority of the officer in whom such authority is specially vested.

¹⁴ *Norfolk vs. People*, 43 Ill., 9.
¹⁵ *Askins vs. Commonwealth*, 1
Div., 275.

¹⁶ *Mooney vs. People*, 81 Ill., 134.
¹⁷ *Morgan vs. Commonwealth*, 12
Bush (Ky.), 84.

TWENTY-EIGHTH SUBJECT.

Insurance.

CHAPTER I.

NATURE AND HISTORY OF INSURANCE.

SECTION 1. DEFINITIONS.

The following are some of the best recent definitions of insurance: "Insurance is a contract by which the one party, in consideration of a price paid to him adequate to the risk, becomes security to the other that he shall not suffer loss, prejudice, or damage by the happening of the perils specified to certain things which may be exposed to them; a contract whereby one party undertakes to indemnify or guarantee the other against loss by certain specified risks; an act or system of insuring or assuring against loss; specifically the system by or under which indemnity or pecuniary payment is guaranteed by one party or several parties to another party, in certain contingencies, upon specified terms."¹

"Insurance is a conditional contract, whereby one party undertakes to indemnify another against loss, damage, or liability arising from some specified but contingent event."²

"A contract whereby, for an agreed premium, one party undertakes to compensate the other for loss on a specified subject by specified perils."³

SECTION 2. THEORY AND PURPOSE OF INSURANCE.

The purpose of insurance is so far as possible to do away with accidental losses by distributing among a number, all of whom were exposed to a

¹ 22 Cyc., p. 1384-1385.

Vance on Insurance, p. 1, note 1.

² Vance on Insurance, p. 1.

common peril, the loss which has fallen upon one of them. Except to a certain extent in the case of life insurance policies, the contract is, or should be, strictly one of indemnity. This principle of indemnity is illustrated by the two following citations:

“But it appears to us, that the claim of the plaintiff to recover in this action is founded upon an entire misapprehension of the nature and legal effect of a contract of insurance. An insurance of buildings against loss by fire, although in popular language it may be called an insurance of the estate, is in effect a contract of indemnity with any owner, or other person having an interest in the preservation of the buildings, as mortgagee, tenant, or otherwise, to indemnify him against any loss which he may sustain, in case they are destroyed or damaged by fire. If, therefore, the assured has wholly parted with his interest before they are burnt, and they are afterwards burnt, the underwriter incurs no obligation to pay anybody. The contract was to indemnify the assured; if he has sustained no damage, the contract is not broken. If indeed, on a transfer of the estate, the vendor assigns his policy to the purchaser, and this is made known to the insurer, and is assented to by him, it constitutes a new and original promise to the assignee to indemnify him in like manner, whilst he retains an interest in the estate, and the exemption of the insurer from further liability to the vendor, and the premiums already paid for insurance for a term not yet expired, are a good consideration for such promise, and constitute a new and valid contract between the insurer and the assignee. But such undertaking will be binding, not because the policy is in any way incident to the estate, or runs

with the land, but in consequence of the new contract. Even the assignment of a chose in action, with the consent of the debtor, and a promise on his part to pay the assignee, constitute a new contract on which the assignee may sue in his own name.”⁴

“The plaintiff can only recover an indemnity. Then what has this party lost, if he has sold his interest in the ship, irrespective of the policy? Bank’s interest is not protected, because she gave no authority to effect the insurance. Unless, therefore, there was some understanding that the policy should be kept alive for her benefit the plaintiffs, suing on behalf of Page, have lost nothing. If the policy had been handed over with the bill of sale, or there had been an order to the brokers to hand it over, the case would be different; then the parties might sue as trustees for the purchaser; but we cannot infer that, no facts being stated in the case to warrant such an inference.”⁵

SECTION 3. FORMS OF INSURANCE.

The principal forms of insurance are fire insurance, life insurance, and marine insurance. The following minor forms of insurance are also in existence at the present time—accident insurance, benefit insurance, benevolent insurance, casualty insurance, fidelity insurance, guaranty insurance, lightning insurance, plate-glass insurance, rent insurance and title insurance.

SECTION 4. HISTORY OF INSURANCE—MARINE INSURANCE.

The oldest form of insurance was that of marine insurance. This seems to have originated in Rhodes, to have been adopted by the commercial cities of Italy and by the towns of the Hanseatic League

⁴ Wilson vs. Hill, 3 Metc., 66.

⁵ Powell vs. Innes, 11 M. & W., 10.

between the twelfth and fourteenth centuries, and to have been introduced into England in the sixteenth century. The law of insurance was a branch of the law merchant and very greatly out of harmony with the principles of the common law. Early insurance cases were generally either submitted to the arbitration of a merchant court or tried before a special court created for that purpose in the first year of the seventeenth century. Only about fifty cases had come before the common law courts up to the middle of the eighteenth century. The business of marine insurance was in its early stages mainly conducted at Lloyd's Coffee House in London, and it was here that much of the law and custom governing marine insurance was developed.

‘‘It is known that Lloyd’s Coffee House, an inn kept by one Edward Lloyd on Tower Street in London, was, as early as 1688, a popular resort for seafaring men and merchants engaged in foreign trade. It became the custom among those who gathered at Lloyd’s to make their gathering an occasion for arranging their mutual contracts of insurance against the sea. In making such contracts it was the custom for the person desiring the insurance to pass around among the company assembled a slip upon which was written a description of the vessel and its cargo, with the name of the master and the character of his crew, and the voyage contemplated. Those desiring to become insurers of the ventures so described would write beneath the description on this slip their names or initials, and opposite thereto the amount which each was willing to be liable for as an insurer. When the total amount of insurance desired by the owner of the vessel was thus underwritten, the contract was com-

plete. From this practice, among those congregating at Lloyd's, is derived the term 'underwriters,' as now applied to insurers. The business of insurance carried on in this informal way at Lloyd's seems to have increased rapidly, and the commercial importance of the house required that it should be removed to a more commodious and convenient site, which was found on Lombard Street, whither Lloyd removed his house in 1692. Both the importance of this coffee house in commercial circles, and the enterprise of its proprietor, were shown by the establishment in 1696 of a newspaper, giving information of commercial transactions and of the movement of shipping throughout the world. While this newspaper was shortly afterwards suppressed by reason of some indiscretion on the part of its publisher, it was yet the progenitor of 'Lloyd's Lists,' the publication of which was begun in 1726, and which continues up to this day as the most important publication in the shipping and commercial world. After various removals, Lloyd's finally found permanent quarters in the Royal Exchange, where it is now located, and remains, probably the greatest and most important single commercial factor in the mercantile world."*

SECTION 5. HISTORY OF INSURANCE—FIRE INSURANCE.

Small local associations for mutual aid in case of loss by fire appear to have existed in England at a very early time. The first regular office for this purpose of insuring against loss by fire was established in 1681, fifteen years after the great London fire. Fire insurance did not meet as favorable reception as marine insurance, on account of the temptation which it was supposed to furnish for the commission of

* Vance on Insurance, p. 10.

arson, and great development of this form of insurance has only come in the last sixty years. The first fire insurance company was established in the United States in 1752.

SECTION 6. HISTORY OF INSURANCE—LIFE INSURANCE.

The first attempt to establish life insurance was in 1706 in England and in 1769 in America. Life insurance has only assumed large proportions in this country since the Civil War.

SECTION 7. THE CONTRACT OF INSURANCE.

Not only does the contract of insurance present many contrasts to contracts of other kinds, but the contract of fire insurance and marine insurance differ from each other in many respects. In the next chapter, the general insurance contract will be considered and in the three succeeding chapters the peculiarities of the three principal forms will be taken up.

CHAPTER II.

CONTRACT OF INSURANCE.

SECTION 8. PARTIES.

A contract of insurance, like other contracts, can only be entered into by people *sui juris*. Either an individual or a corporation may be an insurer. In most states at the present time there are statutory requirements which must be complied with before insurance companies can write insurance policies.

A contract of insurance is not a contract for necessities, and therefore one made by an infant may be disaffirmed. Until such disaffirmance, however, it is a binding contract. A contract of insurance made with an insane person is void, if he has been adjudged insane, otherwise only voidable. A contract of insurance with an alien enemy is void.

In addition to the qualifications required to make a person a competent party in the contract of insurance, the insured in an insurance company must have an insurable interest in the subject of insurance. What will constitute an insurable interest in this class of insurance contracts will be considered in the next three chapters.

SECTION 9. MAKING A CONTRACT.

The forms of requisites for making a contract do not differ greatly from those in the case of other contracts. A contract of insurance does not come within the provisions of the Statute of Frauds. Such a contract is not included within the provisions of the statute governing agreements, "not to be per-

formed within one year from the making thereof," because the loss may occur in less than a year.¹

An oral contract of insurance is good. "Upon an oral contract of insurance, where nothing is said about conditions, if a policy is to be issued, the parties are presumed to intend that it shall contain the conditions usually inserted in policies of insurance in like cases, or as have been before used by the parties. That a particular condition is usual must be shown by the party who insists upon it, who has the affirmative."²

Contracts of insurance, however, are almost invariably reduced to writing. Such a written contract is called an insurance policy. Such a contract merges prior or contemporaneous parol agreements relative to the transaction.

SECTION 10. THE CONSIDERATION.

In a contract of insurance, as in all other contracts, there must be a consideration from both parties to contract. In the case of *Phoenix Life Insurance Co. vs. Roddin*,³ the Supreme Court of the United States discussed the subject of consideration in insurance contracts as follows:

"But the 'consideration,' in the legal sense of the word, of a contract, is the *quid pro quo*, that which the party to whom a promise is made does, or agrees to do, in exchange for the promise. In a contract of insurance, the promise of the insurer is to pay a certain amount of money upon certain conditions; and the consideration on the part of the insured is his payment of the whole premium at the inception of the

¹ *Wiebeler vs. Milwaukee Mechanics Mutual Ins. Co.*, 30 Minn., 464.

² *Woodruff, Cases on Insurance*, p. 79.
120 U. S., 183.

contract, or his payment of part then, and his agreement to pay the rest at certain periods while it continues in force. In the present case, at least, the application is collateral to the contract, and contains no promise or agreement of the assured. The statements in the application are only representations upon which the promise of the insurer is based, and conditions limiting the obligation which he assumes. If they are false, there is a misrepresentation, or a breach of condition, which prevents the obligation of the insurer from ever attaching, or brings it to an end, but there is no breach of any contract or promise on the part of the assured, for he has made none. In short, the statements in this application limit the liability of the insurer, but they create no liability on the part of the assured. The expression at the beginning of the policy, that the insurance is made 'in consideration of the representations made in the application for this policy,' and of certain sums paid and to be paid for premiums, does not make those representations part of the consideration, in the technical sense, or render it necessary or proper to plead them as such."

SECTION 11. PREMIUMS.

A premium is a sum of money paid by the insured in consideration for the protection furnished by the insurer. The payment of a premium is not always a necessary prerequisite for the attaching of the liability of the insurer. The promise of the insured to pay, whether express or implied from circumstances, is a valid consideration and will support the contract.⁴ In the case of *Fire Ins. Co. vs. Kuessner*,⁵ the Supreme

⁴ *Wood vs. Poughkeepsie Mut. Ins. Co.*, 32 N. Y., 619.

⁵ 164 Ill., 275.

Court of Illinois said in discussing this question:

“A suit to enforce the liability of an insurance company may be brought on the contract for insurance as well as upon the policy. The real cause of action is the same in both the contract and policy. The measure of damages recoverable is the same, and the policy must be based on the contract of insurance, and can contain no element different therefrom. Where an application for insurance is presented to a company stating what is wanted, and the terms, and its officer or any agent having authority to issue a policy says one will be issued on that application, the minds of the parties have met in the execution of a contract and a contract for insurance has been consummated. It is an oral contract. Though proposed in writing, the acceptance by parol and a promise to issue a policy thereon constitute an oral contract. Corporations authorized by their charters to make insurance and issue policies are not precluded from entering into parol contracts to effect the same object. Whatever doubts might have heretofore existed as to the validity of parol contracts of insurance, it is now settled such contracts are valid. *Trustees vs. Brooklyn Fire Ins. Co.*, 19 N. Y., 305; *Commercial Marine Ins. Co. vs. Union Ins. Co.*, 19 How., 321; *Ellis vs. Albany City Fire Ins. Co.*, 59 N. Y., 402; *Fire Assn. of Philadelphia vs. Smith*, 59 Ill. App., 655; *Taylor vs. Merchants' Fire Ins. Co.*, 9 How., 390; *Hartford Ins. Co. vs. Farrish*, 73 Ill., 166.

“The evidence was sufficient to sustain the averments of that court of the declaration declaring on an oral contract. *Commercial Ins. Co. vs. Hallock*, 3 Dutch, 645.

the time of the insurance. A further condition of the policy was: 'If, after insurance is effected, either by the original policy or by a renewal thereof, the risk be increased by any means, or occupied in any way so as to render the risk more hazardous than at the time of insuring, such insurance shall be void and of no effect.' The evidence showed the building insured in that case was destroyed by fire; that at the time there were therein two stoves, one on the first and the other on the second floor, in which fire had been after the insurance; that there had been no fire in the stove on the first floor for eight days previous to the destruction of the building, while in the stove on the second floor a fire was kindled at six o'clock A. M., and extinguished about eight or half-past eight, and about eleven o'clock P. M. the next night the destruction of the insured property occurred. The question was whether there was increased risk because of these stoves at the time of the fire, and it was said, following the Wetmore case, 'that the true construction of a clause like this was, that the policy became inoperative only while the increased risk was in existence, and when it terminated the liability of the company would recommence.'

"The Schmidt case was followed by Insurance Company of North America vs. McDowell, 50 Ill., 120, where it was said: 'It is likewise insisted that as to a portion of these policies appellees, by making repairs on the property after the insurance was effected, have violated one of the conditions which prohibited them from doing any act which would increase the hazard. In the case of New England Fire and Marine Ins. Co. vs. Wetmore, 32 Ill., 245, it was held that an increase of the hazard only suspended the policy

during the continuance of the increased hazard, and when it terminated the liability of the company commenced. This rule is recognized and applied in the case of *Schmidt vs. Peoria Marine and Fire Ins. Co.*, 41 Ill., 295. If the hazard was increased by making these repairs, it had fully terminated and the liability had recommenced long before the fire occurred.

“In the case of *Insurance Company of North America vs. Garland*, 108 Ill., 220, the policy contained this provision: ‘If the assured shall allow the building herein insured to become vacant or inoccupied, and so remain, * * * unless the consent of this company be endorsed hereon, the policy shall become void.’ For a long time before the fire which destroyed the insured building it had been vacant, and was so at the time of its destruction, but it was held there could be no recovery. It was also said: ‘It is well settled, if the company should not exercise this power’ (to declare the policy forfeited) ‘while the assured is in default, and the premises should again become occupied, its right to do so would cease and its liability on the policy would again attach.’ This principle is also sustained in *Germania Fire Ins. Co. vs. Hlewer*, 129 Ill., 599.

“We are asked to overrule these decisions, as no being in line with the current of authority. These decisions, whilst in conflict with the courts of New York and some other states, have so long been the rule in this State that we are not disposed to qualify or in any manner depart from the rule announced therein. The rule is: though there be a change of risk by reason of an increased hazard, which would avoid the policy if declared forfeited by the company, yet where the company has not declared the policy

forfeited and the cause for the increased hazard no longer exists, and there is no increased hazard by reason of former changed conditions, then the policy being for insurance for a certain period, the contract of insurance will be construed, and the fact determined whether there was an increased risk at the time of the fire which in any manner was conducive to the loss. If a loss occurs during the increased hazard a recovery will be defeated. If a former increase of hazard has ceased to exist, and that increase of hazard at that former time in no way has affected the risk when the loss occurs, no reason exists why a forfeiture should result from a cause which occasions no damage. The insurance companies insert clauses and conditions for their own protection and dictate their terms, and on every principle of construction such clauses are construed most strongly against those who dictate and insert them. No violence is done the language used by the construction we have adopted and no injustice is done either party to the contract.

“It never has been held by this court that if the change of condition has effected results which continue, and causes an increase of hazard to exist at the time the property is destroyed, the removal of the cause of the increase of hazard would prevent the company from showing the result and effect of the former act changing conditions. In the *Wetmore* case it was said: ‘Even if it was an unauthorized use of the premises it had ceased long before the fire. But the question of increase of risk by such use of the premises was submitted to the jury, and they have by their findings ignored the claim and pretenses of the appellants, and believing they have found correctly on this point, we are not disposed to disturb their verdict.’

In the Schmidt case it was said: 'The point for the consideration of the jury was, not whether an increase in the number of fires in a building does or does not ordinarily increase the risk, but whether in the case then before the court the risk to the building at the time it was destroyed, at eleven o'clock at night, was or was not increased by the two stoves, in one of which there had been no fire for eight days and in the other none after eight and a half o'clock of the preceding morning.' Both these cases recognize the right of the company to show that the act of the assured increased the hazard at the time of the loss. If the hazard was not increased at the time of the loss, it is fatuous to say that long before some act was done that increased the risk then, but did not affect the risk at the time of the loss. Whether there was any increase in the hazard which affected the risk at the time of the loss was a question of fact. If, as a matter of fact, there was no increase of hazard, the policy was in force and of binding effect and the plaintiff had a right to recover thereon. This construction, and the rule to which we adhere, are more consonant with sound reason than is the rule adopted by those courts with which we are not in accord. That a recovery on a policy on a building in the center of the burned district in Chicago's great fire should be defeated because a gallon of gasoline was therein kept and used a year before that time does not commend itself as a reasonable rule. If the policy was rendered void by that act, that would have resulted even though it was in no way conducive to the loss."

There are many cases, however, and perhaps the weight of authority is on the other side.

SECTION 28. CHANGES IN POSITION OR CONDITION OF INSURER OR PROPERTY.

Insurance policies often contain a condition that a change of interest, title, or possession shall work a forfeiture of the policy.

"This condition is intended to protect the insurer from any contingency that might increase the risk assumed by the insurer by decreasing the interest of the insured. Hence it is construed to include any such acts or events affecting the title of the insured as substantially change the quantity of his beneficial interest, immaterial modifications of interest, title, or possession being ignored." *

The condition against other insurance is to prevent over insurance, and will generally only be held to forfeit the policy when it has such effect.

Any increase of risk is such a substantial change of conditions as to work a forfeiture of the policy.

This question was thus discussed in the case of *Kyte vs. Assurance Co.*¹⁰ as follows:

"The question is thus presented whether the provision of the policy that it shall be void in case of an increase of risk means that it shall be void only during the time while the increase of risk may last, and may revive again upon the termination of the increase of risk. The provision is that the policy shall be void if any one of several circumstances successively enumerated shall be found to exist. Some of these circumstances relate to the time of issuing the policy, and others could not arise until afterwards. They are of different degrees of importance, some of them going to the essential matters of the contract,

* *Vance on Insurance*, Sec. 161.

¹⁰ 149 Mass., 116; 21 N. E. 361.

and others being comparatively trivial in character. The language of the policy is the same in respect to them all, that the policy shall be void. In *Hinckley vs. Insurance Co.*, 140 Mass., 38, 1 N. E. Rep., 737, the policy was in the same form as those in the present cases, and for a short time during the term of the policy the plaintiff kept a bowling-alley and billiard-table without having any license therefor. There was no question of increase of risk or other actual prejudice to the insurer; and, under these circumstances, two questions arose: First, whether the plaintiff's act fell within the provision that the policy should be void if gunpowder or other articles subject to legal restriction should be kept in a manner different from that allowed by law; and, secondly, whether, assuming that the policy would be void during the time of the illegal keeping of the bowling-alley and billiard-table, it would revive after such temporary use had ceased. In deciding the case the court intimated that the plaintiff's act was not within the meaning of the provision in the policy, unless the risk was thereby increased, but placed the decision upon the second ground, that the policy would revive. The court now thinks it would have been better to place the decision of this part of the case solely upon the first ground, leaving it an open question whether a departure from the terms of the provisions of the policy, without an increase of risk, may be deemed merely to suspend, and not absolutely to avoid, the policy. However that may be, we think an increase in risk entitles the insurer to avoid the policy absolutely. The contract of insurance depends essentially upon an adjustment of the premium to the risk assumed. If the assured, by his voluntary act,

increases the risk, and the fact is not known, the result is that he gets an insurance for which he has not paid. In its effect upon the company it is not much different from the misrepresentation of the condition of the property.

“If the provision stood alone, that in case of any material misrepresentation as to the risk, or any voluntary increase of risk afterwards, the policy should be void, it could hardly be doubted that the words should be taken in their natural obvious meaning. The fact that with this are coupled the other provisions above referred to does not change its meaning with reference to the effect and consequence of an increase of risk. An increase of risk which is substantial, and which is continued for a considerable period of time, is a direct and certain injury to the insurer, and changes the basis upon which the contract of insurance rests; and since there is a provision that in case of an increase of risk which is consented to or known by the assured, and not disclosed, and the assent of the insurer obtained, the policy shall be void, we do not feel at liberty to qualify the meaning of these words by holding that the policy is only suspended during the continuance of such increase. *Lyman vs. Insurance Co.*, 14 Allen, 329; *Mead vs. Insurance Co.*, 7 N. Y., 530. It follows, therefore, that the fourth instruction which was requested, or something in substance like it, should have been given. Upon the facts stated and assumed, the increase of risk, if there was one, continued for 15 months, and could not be treated as a casual, inadvertent, or inevitable thing. Exceptions sustained.”

CHAPTER V.

LIFE INSURANCE.

SECTION 29. NATURE OF THE CONTRACT.

The theory of a life insurance contract differs very materially from that of any other kind of insurance contract. Although in an early case an attempt was made to reconcile the contract of life insurance with the indemnity principle existing in all other forms of insurance,¹ this view has been abandoned, and it is now the doctrine that life insurance is not a contract of indemnity, but an agreement to pay a certain sum in the event therein specified, in consideration of the payment of the stipulated premium or premiums.²

In *Phoenix Mutual Life Insurance Co. vs. Bailey*,³ the Supreme Court of the United States said on this point as follows:

“Policies of life insurance are governed, in some respects, by different rules of construction from those applied by the courts in case of policies against marine risks or policies against loss by fire.

“Marine and fire policies are contracts of indemnity, by which the claim of the insured is commensurate with the damages he sustained by the loss of, or injury to, the property insured. Such being the nature of the contract, it is clear that an absolute sale of the property insured, prior to the alleged disaster, is a good defense to an action on the policy, as the insured cannot justly claim indemnity for the

¹ *Godsall vs. Volders*, 9 East., 72.

² See *American & English Ency.*

of Law, Vol. XVI, page 843.

³ 13 Wallace, 616.

loss of or injury to property in which he had no insurable interest at the time the loss or injury occurred.

“Life insurances have sometimes been construed in the same way, but the better opinion is that the decided cases which proceed upon the ground that the insured must necessarily have some pecuniary interest in the life of the *cestui que vie* are founded in an erroneous view of the nature of the contract; that the contract of life insurance is not necessarily one merely of indemnity for a pecuniary loss, as in marine and fire policies; that it is sufficient to show that the policy is not invalid as a wager policy, if it appear that the relation, whether of consanguinity or of affinity, was such, between the person whose life was insured and the beneficiary named in the policy, as warrants the conclusion that the beneficiary had an interest, whether pecuniary or arising from dependence or natural affection, in the life of the person insured. *Dalby vs. India and Lon. Ins. Co.*, 15 C. B., 365; *Loomis vs. Eagle L. & H. Ins. Co.*, 6 Gray, 396; *Lord vs. Dall*, 12 Mass., 118; *Trenton L. & F. Ins. Co. vs. Johnson*, 4 Zab, 576; *Rawls vs. Am. L. Ins. Co.*, 36 Barb., S. C., 27 N. Y., 282.

“Insurers in such a policy contract to pay a certain sum, in the event therein specified, in consideration of the payment of the stipulated premium or premiums, and it is enough to entitle the insured to recover if it appear that the stipulated event has happened, and that the party effecting the policy had an insurable interest, such as is described, in the life of the person insured at the inception of the contract, as the contract is not merely for an indemnity, as in marine and fire policies,”

SECTION 30. WHO MAY INSURE.

A person can always insure his own life to any extent that he sees fit,⁴ and such insurance may either be for the benefit of his estate, or for the benefit of any person or persons whom he may designate. It is not necessary that the beneficiary should have any interest in the life of the insurer.⁵

Where the policy is taken out by a third person, such person must have an insurable interest in the life of the person whose life is insured. Such interest must exist at the time the insurance was taken out, but not necessarily at the time of the death. This is the exact reverse of the rule in the case of marine or fire insurance.

This question was thus discussed by the Supreme Court of the United States in the case of *Warnock vs. Davis*:⁶

"It is not easy to define, with precision, what will in all cases constitute an insurable interest, so as to take the contract out of the class of wager policies. It may be stated generally, however, to be of such an interest, arising from the relations of the party obtaining the insurance, either as creditor or surety for the assured, or from the ties of blood or marriage, to him, as will justify a reasonable expectation of advantage or benefit from the continuance of his life. It is not necessary that the expectation of advantage or benefit should be always capable of pecuniary estimation, for a parent has an insurable interest in the life of his child, and a child in the life of his parent; a husband in the life of his wife and a wife in the life of her husband. The natural affection in cases of this kind is

⁴ *Union Fraternal League vs. Walton*, 109 Ga., 1; 34 S. E., 317

⁵ *Elkhart Mut. Aid B. & R. Assn.*

vs. Houghton, 103 Ind., 286; 2 N. E., 763.

⁶ 104 U. S., 775.

considered as more powerful, as operating more efficaciously, to protect the life of the insured than any other consideration. But in all cases there must be a reasonable ground, founded upon the relations of parties to each other, either pecuniary or of blood or affinity, to expect some benefit or advantage from the continuance of the life of the assured. Otherwise, the contract is a mere wager, by which the party taking the policy is directly interested in the early death of the assured. Such policies have a tendency to create a desire for the event. They are, therefore, independently of any statute on the subject, condemned, as being against public policy.

“The assignment of a policy to a party not having an insurable interest is as objectionable as the taking out of a policy in his name. Nor is its character changed because it is for a portion merely of the insurance money. To the extent in which the assignee stipulates for the proceeds of the policy beyond the sum advanced by him, he stands in the position of one holding a wager policy. The law might be readily evaded, if the policy or an interest in it could, in consideration of paying the premiums and assessments upon it, and the promise to pay upon the death of the assured a portion of its proceeds to his representatives, be transferred so as to entitle the assignee to retain the whole insurance money.

“The question here presented has arisen, under somewhat different circumstances, in several of the State Courts; and there is a conflict in their decisions. In *Ins. Co. vs. Hazzard*, which arose in Indiana, the policy of insurance, which was for \$3,000, contained the usual provision that if the premiums were not paid at the time specified the policy would be forfeited.

The second premium was not paid, and the assured, declaring that he had concluded not to keep up the policy, sold it for \$20 to one having no insurable interest, who took an assignment of it with the consent of the secretary of the insurance company. The assignee subsequently settled with the company for the unpaid premium. In a suit upon the policy, the Supreme Court of the State held that the assignment was void, stating that all the objections against the issuing of a policy to one upon the life of another, in whose life he has no insurable interest, exist against holding such a policy by mere purchase and assignment. 'In either case,' said the court, 'the holder of such policy is interested in the death rather than the life of the party assured. The law ought to be, and we think it clearly is, opposed to such speculations in human life.' 41 Ind., 116. The court referred with approval to a decision of the same purport by the Supreme Court of Massachusetts in *Stevens vs. Warren*, 101 Mass., 564. There the question presented was whether the assignment of a policy by the assured in his lifetime, without the assent of the insurance company, conveyed any right in law or equity to the proceeds when due. The court was unanimously of opinion that it did not, holding that it was contrary not only to the terms of the contract, but contrary to the general policy of the law respecting insurance, in that it might lead to gambling or speculative contracts upon the chances of human life. The court also referred to provisions sometimes inserted in a policy expressing that it is for the benefit of another, or is payable to another than the representatives of the assured, and, after remarking that the contract in such a case might be sustained, said: "That the same

would probably be held in the case of an assignment with the assent of the assurers. But if the assignee has no interest in the life of the subject which would sustain a policy to himself, the assignment would take effect only as a designation, by mutual agreement of the parties, of the person who should be entitled to receive the proceeds when due, instead of the personal representatives of the deceased. And if it should appear that the arrangement was a cover for a speculating risk, contravening the general policy of the law, it would not be sustained."

SECTION 31. FORMS OF LIFE INSURANCE POLICIES.

The various kinds of life insurance policies have been thus described by a recent writer:⁷

"The kinds of life policies are limited in number only by the ingenuity of the actuaries and managers of the numerous competing companies, insuring against the loss of life, and only the more important and usual kinds may be mentioned. The oldest and most frequent form, even at the present time, is known as the 'regular life,' under the terms of which the insured is required to pay a certain fixed premium annually throughout life, and the beneficiary is entitled to receive payment under the policy only upon the death of the insured.

"Another kind of policy which, from the time of its invention by Lorenzo Tonti, an Italian, in 1650, has always proved exceedingly attractive is the 'tontine.' The original tontine contract was for the purpose of securing government loans on advantageous terms from the people, and was based upon a division of the lenders into classes, only the survivors of which

⁷ Vance on Insurance, Secs. 14-15.

were at any given period to participate in the payment of the dividends or principal. This, in its simple form, is seen to be the reverse in many respects of the ordinary contract of life insurance, under which it is to the interest of the insurer that the insured should survive the making of the contract long enough to pay in the premiums an amount equal to, or in excess of the sum received by the beneficiaries under the policy. Under the tontine contract, however, death before the dividend period entirely deprived the decedent, or his nominee, of any benefits from the contract whatever, but the interest of all dying would pass to the survivors, so that the last survivor of any class would receive the dividends that originally accrued to the whole class, and, if the terms of the contract so provided, might also receive the entire principal sum of the loan. A great many of the modern life insurance policies contain tontine features, more or less modified to suit the desires of the insured. Thus, in many endowment policies, it is provided that dividends shall be apportioned to all policies subsisting after a certain period, whether five, ten or twenty years. Under such contracts, those policies maturing or lapsing prior to the expiration of the dividend period receive no dividends, but those still in force at the end of the tontine period receive the benefit, by way of increased dividends, of the maturing or the cancellation of other policies.

“As has been stated heretofore, the modern life insurance contract is as much a contract of investment as of insurance. In the regular life policies defined above, the insurance feature is given prominence, but there are written many and various kinds of life policies in which the investment feature is paramount.

Such policies are generally called 'endowment policies,' and usually provide that the insured shall pay a certain premium annually for a stated period of years. If the insured dies before the end of the endowment period, the beneficiary receives the amount which is agreed to be paid in the policy; but if the insured survives the endowment period, he is entitled at its end to receive the amount written in the face of the policy, with any dividends that may be awarded under the authority of the directors of the company from the surplus receipts of the company."

TWENTY-NINTH SUBJECT.

Bankruptcy Law.

BANKRUPTCY.

INTRODUCTION.

Bankruptcy law is entirely statutory, no common law bankruptcy being recognized in this country. The respective powers of the Federal and State governments to pass bankruptcy laws have already been discussed.¹ The text of the existing Federal Bankruptcy Law is here inserted in full.

¹ Vol. II, subject 3, section 4.

CHAPTER I.
DEFINITIONS.

AN ACT TO ESTABLISH A UNIFORM SYSTEM OF BANKRUPTCY THROUGHOUT THE UNITED STATES.

*Be it enacted by the Senate and House of Representatives
of the United States of America, in Congress
assembled:*

SECTION 1. MEANING OF WORDS AND PHRASES.—a
The words and phrases used in this Act and in proceedings pursuant hereto shall, unless the same be inconsistent with the context, be construed as follows:

(1) "A person against whom a petition has been filed" shall include a person who has filed a voluntary petition;

(2) "adjudication" shall mean the date of the entry of a decree that the defendant, in a bankruptcy proceeding, is a bankrupt, or if such decree is appealed from, then the date when such decree is finally confirmed;

(3) "appellate courts" shall include the circuit courts of appeals of the United States, the supreme courts of the Territories, and the Supreme Court of the United States;

(4) "bankrupt" shall include a person against whom an involuntary petition or an application to set a composition aside or to evoke a discharge has been filed, or who has filed a voluntary petition, or who has been adjudged a bankrupt;

(5) "clerk" shall mean the clerk of a court of bankruptcy;

(6) "corporations" shall mean all bodies having any of the powers and privileges of private corporations not possessed by individuals or partnerships, and shall include limited or other partnership associations organized under laws making the capital subscribed alone responsible for the debts of the association;

(7) "court" shall mean the court of bankruptcy in which the proceedings are pending, and may include the referee;

(8) "courts of bankruptcy" shall include the district courts of the United States and of the Territories, the supreme court of the District of Columbia, and the United States court of the Indian Territory, and of Alaska;

(9) "creditor" shall include anyone who owns a demand or claim provable in bankruptcy, and may include his duly authorized agent, attorney, or proxy;

(10) "date of bankruptcy," or "time of bankruptcy," or "commencement of proceedings," or "bankruptcy," with reference to time, shall mean the date when the petition was filed;

(11) "debt" shall include any debt, demand, or claim provable in bankruptcy;

(12) "discharge" shall mean the release of a bankrupt from all of his debts which are provable in bankruptcy, except such as are excepted by this Act;

(13) "document" shall include any book, deed, or instrument in writing;

(14) "holiday" shall include Christmas, the Fourth of July, the Twenty-second of February, and any day appointed by the President of the United States or the Congress of the United States as a holiday or as a day of public fasting or thanksgiving;

(15) a person shall be deemed insolvent within

the provisions of this Act whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, with intent to defraud, hinder or delay his creditors, shall not, at a fair valuation, be sufficient in amount to pay his debts;

(16) "judge" shall mean a judge of a court of bankruptcy, not including the referee;

(17) "oath" shall include affirmation;

(18) "officer" shall include clerk, marshal, receiver, referee, and trustee, and the imposing of a duty upon or the forbidding of an act by any officer shall include his successor and any person authorized by law to perform the duties of such officer;

(19) "persons" shall include corporations, except where otherwise specified, and officers, partnerships, and women, and when used with reference to the commission of acts which are herein forbidden shall include persons who are participants in the forbidden acts, and the agents, officers, and members of the board of directors or trustees, or other similar controlling bodies or corporations;

(20) "petition" shall mean a paper filed in a court of bankruptcy or with a clerk or deputy clerk by a debtor praying for the benefits of this Act, or by creditors alleging the commission of an act of bankruptcy by a debtor therein named;

(21) "referee" shall mean the referee who has jurisdiction of the case or to whom the case has been referred, or anyone acting in his stead;

(22) "conceal" shall include secrete, falsify, and mutilate;

(23) "secured creditor" shall include a creditor who has security for his debt upon the property of the

bankrupt of a nature to be assignable under this Act, or who owns such a debt for which some indorser, surety, or other persons secondarily liable for the bankrupt has such security upon the bankrupt's assets;

(24) "States" shall include the Territories, the Indian Territory, Alaska, and the District of Columbia;

(25) "transfer" shall include the sale and every other and different mode of disposing of or parting with property, or the possession of property, absolutely or conditionally, as a payment, pledge, mortgage, gift, or security;

(26) "trustee" shall include all of the trustees of an estate;

(27) "wage-earner" shall mean an individual who works for wages, salary, or hire, at a rate of compensation not exceeding one thousand five hundred dollars per year;

(28) words importing the masculine gender may be applied to and include corporations, partnerships, and women;

(29) words importing the plural number may be applied to and mean only a single person or thing;

(30) words importing the singular number may be applied to and mean several persons or things.

CHAPTER II.

CREATION OF COURTS OF BANKRUPTCY, AND THEIR JURISDICTION.

SEC. 2. That the courts of bankruptcy as herebefore defined, viz., the district courts of the United States in the several States, the supreme court of the District of Columbia, the district courts of the several Territories, and the United States courts in the Indian Territory and the District of Alaska, are hereby made courts of bankruptcy, and are hereby invested, within their respective territorial limits as now established, or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings, in vacation in chambers and during their respective terms, as they are now or may be hereafter held, to

(1) adjudge persons bankrupt who have had their principal place of business, resided, or had their domicile within their respective territorial jurisdictions for the preceding six months, or the greater portion thereof, or who do not have their principal place of business, reside, or have their domicile within the United States, but have property within their jurisdictions, or who have been adjudged bankrupts by courts of competent jurisdiction without the United States and have property within their jurisdictions;

(2) allow claims, disallow claims, reconsider allowed or disallowed claims, and allow or disallow them against bankrupt estates;

(3) appoint receivers or the marshals, upon application of parties in interest, in case the courts shall

find it absolutely necessary, for the preservation of estates, to take charge of the property of bankrupts after the filing of the petition and until it is dismissed or the trustee is qualified;

(4) arraign, try, and punish bankrupts, officers, and other persons, and the agents, officers, members of the board of directors or trustees, or other similar controlling bodies, of corporations for violations of this Act, in accordance with the laws of procedure of the United States now in force, or such as may be hereafter enacted, regulating trials for the alleged violation of laws of the United States;

¹(5) authorize the business of bankrupts to be conducted for limited periods by receivers, the marshals, or trustees, if necessary in the best interests of the estates, and allow such officers additional compensation for such services, but not at a greater rate than in this Act allowed trustees for similar services;

(6) bring in and substitute additional persons or parties in proceedings in bankruptcy when necessary for the complete determination of a matter in controversy;

(7) cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided;

(8) close estates whenever it appears that they have been fully administered, by approving the final accounts and discharging the trustees, and reopen them whenever it appears they were closed before being fully administered;

(9) confirm or reject compositions between debtors

¹ This subdivision was amended by the act of 1903 by the insertion of the words "and allow such officers additional com-

pensation for such services, but not at a greater rate than in this Act allowed trustees for similar services."

and their creditors, and set aside compositions and reinstate the cases;

(10) consider and confirm, modify or overrule, or return, with instructions for further proceedings, records and findings certified to them by referees;

(11) determine all claims of bankrupts to their exemptions;

(12) discharge or refuse to discharge bankrupts and set aside discharges and reinstate the cases;

(13) enforce obedience by bankrupts, officers, and other persons to all lawful orders, by fine or imprisonment or fine and imprisonment;

(14) extradite bankrupts from their respective districts to other districts;

(15) make such orders, issue such process, and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this Act;

(16) punish persons for contempts committed before referees;

(17) pursuant to the recommendation of creditors, or when they neglect to recommend the appointment of trustees, appoint trustees, and upon complaints of creditors, remove trustees for cause upon hearings and after notices to them;

(18) tax costs, whenever they are allowed by law, and render judgments therefor against the unsuccessful party, or the successful party for cause, or in part against each of the parties, and against estates, in proceedings in bankruptcy; and

(19) transfer cases to other courts of bankruptcy.

Nothing in this section contained shall be construed to deprive a court of bankruptcy of any power it would possess were certain specific powers not herein enumerated.

CHAPTER III.

BANKRUPTS.

SEC. 3. ACTS OF BANKRUPTCY.—a Acts of bankruptcy by a person shall consist of his having

(1) conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, any part of his property with intent to hinder, delay, or defraud his creditors, or any of them; or

(2) transferred, while insolvent, any portion of his property to one or more of his creditors with intent to prefer such creditors over his other creditors; or

(3) suffered or permitted, while insolvent, any creditor to obtain a preference through legal proceedings, and not having at least five days before a sale or final disposition of any property affected by such preference vacated or discharged such preference; or

¹(4) made a general assignment for the benefit of his creditors, or, being insolvent, applied for a receiver or trustee for his property or because of insolvency a receiver or trustee has been put in charge of his property under the laws of a State, of a Territory, or of the United States; or

(5) admitted in writing his inability to pay his debts and his willingness to be adjudged a bankrupt on that ground.

b A petition may be filed against a person who is insolvent and who has committed an act of bankruptcy within four months after the commission of such act. Such time shall not expire until four months after (1) the date of the recording or registering of the trans-

¹ This subdivision was amended by the insertion of all the matter after the word "creditors."

fer or assignment when the act consists in having made a transfer of any of his property with intent to hinder, delay, or defraud his creditors or for the purpose of giving a preference as hereinbefore provided, or a general assignment for the benefit of his creditors, if by law such recording or registering is required or permitted, or, if it is not, from the date when the beneficiary takes notorious, exclusive, or continuous possession of the property unless the petitioning creditors have received actual notice of such transfer or assignment.

c It shall be a complete defense to any proceedings in bankruptcy instituted under the first subdivision of this section to allege and prove that the party proceeded against was not insolvent as defined in this Act at the time of the filing the petition against him, and if solvency at such date is proved by the alleged bankrupt the proceedings shall be dismissed, and under said subdivision one the burden of proving solvency shall be on the alleged bankrupt.

d Whenever a person against whom a petition has been filed as hereinbefore provided under the second and third subdivisions of this section takes issue with and denies the allegation of his insolvency, it shall be his duty to appear in court on the hearing, with his books, papers, and accounts, and submit to an examination, and give testimony as to all matters tending to establish solvency or insolvency, and in case of his failure to so attend and submit to examination, the burden of proving his solvency shall rest upon him.

e Whenever a petition is filed by any person for the purpose of having another adjudged a bankrupt, and an application is made to take charge of and hold

the property of the alleged bankrupt, or any part of the same, prior to the adjudication and pending a hearing on the petition, the petitioner or applicant shall file in the same court a bond with at least two good and sufficient sureties who shall reside within the jurisdiction of said court, to be approved by the court or judge thereof, in such sum as the court shall direct, conditioned for the payment, in case such petition is dismissed, to the respondent, his or her personal representatives, all costs, expenses, and damages occasioned by such seizure, taking, and detention of the property of the alleged bankrupt.

If such petition be dismissed by the court or withdrawn by the petitioner, the respondent or respondents shall be allowed all costs, counsel fees, expenses, and damages occasioned by such seizure, taking, or detention of such property. Counsel fees, costs, expenses, and damages shall be fixed and allowed by the court, and paid by the obligors in such bond.

SEC. 4. WHO MAY BECOME BANKRUPTS.—a Any person who owes debts, except a corporation, shall be entitled to the benefits of this Act as a voluntary bankrupt.

b Any natural person, except a wage-earner, or a person engaged chiefly in farming or the tillage of the soil, any unincorporated company, and any corporation engaged principally in manufacturing, trading, printing, publishing, mining, or mercantile pursuits, owing debts to the amount of one thousand dollars or over, may be adjudged an involuntary bankrupt upon default or an impartial trial, and shall be subject to the provisions and entitled to the benefits of this Act. Private bankers, but not national banks or banks incorporated under State or Territorial laws, may be adjudged involuntary bankrupts.

The bankruptcy of a corporation shall not release its officers, directors, or stockholders, as such, from any liability under the laws of a State or Territory or of the United States.

SEC. 5. PARTNERS.—a A partnership, during the continuation of the partnership business, or after its dissolution and before the final settlement thereof, may be adjudged a bankrupt.

b The creditors of the partnership shall appoint the trustee; in other respects so far as possible the estate shall be administered as herein provided for other estates.

c The court of bankruptcy which has jurisdiction of one of the partners may have jurisdiction of all the partners and of the administration of the partnership and individual property.

d The trustee shall keep separate accounts of the partnership property and of the property belonging to the individual partners.

e The expenses shall be paid from the partnership property and the individual property in such proportions as the court shall determine.

f The net proceeds of the partnership property shall be appropriated to the payment of the partnership debts, and the net proceeds of the individual estate of each partner to the payment of his individual debts. Should any surplus remain of the property of any partner after paying his individual debts, such surplus shall be added to the partnership assets and be applied to the payment of the partnership debts. Should any surplus of the partnership property remain after paying the partnership debts, such surplus shall be added to the assets of the individual partners in the proportion of their respective interests in the partnership.

g The court may permit the proof of the claim of the partnership estate against the individual estates, and vice versa, and may marshal the assets of the partnership estate and individual estates so as to prevent preferences and secure the equitable distribution of the property of the several estates.

h In the event of one or more but not all of the members of a partnership being adjudged bankrupt, the partnership property shall not be administered in bankruptcy, unless by consent of the partner or partners not adjudged bankrupt; but such partner or partners not adjudged bankrupt shall settle the partnership business as expeditiously as its nature will permit, and account for the interest of the partner or partners adjudged bankrupt.

SEC. 6. EXEMPTIONS OF BANKRUPTS.—a This Act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the State laws in force at the time of the filing of the petition in the State wherein they have had their domicile for the six months or the greater portion thereof immediately preceding the filing of the petition.

SEC. 7. DUTIES OF BANKRUPTS.—a The bankrupt shall

(1) attend the first meeting of his creditors, if directed by the court or a judge thereof to do so, and the hearing upon his application for a discharge, if filed;

(2) comply with all lawful orders of the court;

(3) examine the correctness of all proofs of claims filed against his estate;

(4) execute and deliver such papers as shall be ordered by the court;

(5) execute to his trustee transfers of all his property in foreign countries;

(6) immediately inform his trustee of any attempt, by his creditors or other persons, to evade the provisions of this Act, coming to his knowledge;

(7) in case of any person having to his knowledge proved a false claim against his estate, disclose that fact immediately to his trustee;

(8) prepare, make oath to, and file in court within ten days, unless further time is granted, after the adjudication, if an involuntary bankrupt, and with the petition if a voluntary bankrupt, a schedule of his property, showing the amount and kind of property, the location thereof, its money value in detail, and a list of his creditors, showing their residences, if known, if unknown, that fact to be stated, the amounts due each of them, the consideration thereof, the security held by them, if any, and a claim for such exemptions as he may be entitled to, all in triplicate, one copy of each for the clerk, one for the referee, and one for the trustee; and

(9) when present at the first meeting of his creditors, and at such other times as the court shall order, submit to an examination concerning the conducting of his business, the cause of his bankruptcy, his dealings with his creditors and other persons, the amount, kind, and whereabouts of his property, and, in addition, all matters which may affect the administration and settlement of his estate; but no testimony given by him shall be offered in evidence against him in any criminal proceeding.

Provided, however, That he shall not be required to attend a meeting of his creditors, or at or for an examination at a place more than one hundred and fifty miles distant from his home or principal place of business, or to examine claims except when pre-

sented to him, unless ordered by the court, or a judge thereof, for cause shown, and the bankrupt shall be paid his actual expenses from the estate when examined or required to attend at any place other than the city, town, or village of his residence.

SEC. 8. DEATH OR INSANITY OF BANKRUPTS.—
a The death or insanity of a bankrupt shall not abate the proceedings, but the same shall be conducted and concluded in the same manner, so far as possible, as though he had not died or become insane: *Provided*, That in case of death the widow and children shall be entitled to all rights of dower and allowance fixed by the laws of the State of the bankrupt's residence.

SEC. 9. PROTECTION AND DETENTION OF BANKRUPTS.—
a A bankrupt shall be exempt from arrest upon civil process except in the following cases: (1) when issued from a court of bankruptcy for contempt or disobedience of its lawful orders; when issued from a State court having jurisdiction, and served within such State, upon a debt or claim from which his discharge in bankruptcy would not be a release, and in such case he shall be exempt from such arrest when in attendance upon a court of bankruptcy or engaged in the performance of a duty imposed by this Act.

b The judge may, at any time after the filing of a petition by or against a person, and before the expiration of one month after the qualification of the trustee, upon satisfactory proof by the affidavits of at least two persons that such bankrupt is about to leave the district in which he resides or has his principal place of business to avoid examination, and that his departure will defeat the proceedings in bankruptcy, issue a warrant to the marshal, directing him to bring such

bankrupt forthwith before the court for examination. If upon hearing the evidence of the parties it shall appear to the court or a judge thereof that the allegations are true and that it is necessary, he shall order such marshal to keep such bankrupt in custody not exceeding ten days, but not imprison him, until he shall be examined and released or give bail conditioned for his appearance for examination, from time to time, not exceeding in all ten days, as required by the court, and for his obedience to all lawful orders made in reference thereto.

SEC. 10. EXTRADITION OF BANKRUPTS.—a Whenever a warrant for the apprehension of a bankrupt shall have been issued, and he shall have been found within the jurisdiction of a court other than the one issuing the warrant, he may be extradited in the same manner in which persons under indictment are now extradited from one district within which a district court has jurisdiction to another.

SEC. 11. SUITS BY AND AGAINST BANKRUPTS.—a A suit which is founded upon a claim from which a discharge would be a release, and which is pending against a person at the time of the filing of a petition against him, shall be stayed until after an adjudication or the dismissal of the petition; if such person is adjudged a bankrupt, such action may be further stayed until twelve months after the date of such adjudication, or, if within that time such person applies for a discharge, then until the question of such discharge is determined.

b The court may order the trustee to enter his appearance and defend any pending suit against the bankrupt.

c A trustee may, with the approval of the court,

be permitted to prosecute as trustee any suit commenced by the bankrupt prior to the adjudication, with like force and effect as though it had been commenced by him.

d Suits shall not be brought by or against a trustee of a bankrupt estate subsequent to two years after the estate has been closed.

SEC. 12. COMPOSITIONS, WHEN CONFIRMED.—

a A bankrupt may offer terms of composition to his creditors after, but not before, he has been examined in open court or at a meeting of his creditors and filed in court the schedule of his property and list of his creditors, required to be filed by bankrupts.

b An application for the confirmation of a composition may be filed in the court of bankruptcy after, but not before, it has been accepted in writing by a majority in number of all creditors whose claims have been allowed, which number must represent a majority in amount of such claims, and the consideration to be paid by the bankrupt to his creditors, and the money necessary to pay all debts which have priority and the cost of the proceedings, have been deposited in such place as shall be designated by and subject to the order of the judge.

c A date and place, with reference to the convenience of the parties in interest, shall be fixed for the hearing upon each application for the confirmation of a composition, and such objections as may be made to its confirmation.

d The judge shall confirm a composition if satisfied that (1) it is for the best interests of the creditors; (2) the bankrupt has not been guilty of any of the acts or failed to perform any of the duties which would be a bar to his discharge; and (3) the offer and its accept-

ance are in good faith and have not been made or procured except as herein provided, or by any means, promises, or acts herein forbidden.

e Upon the confirmation of a composition, the consideration shall be distributed as the judge shall direct, and the case dismissed. Whenever a composition is not confirmed, the estate shall be administered in bankruptcy as herein provided.

SEC. 13. COMPOSITIONS, WHEN SET ASIDE.—a The judge may, upon the application of parties in interest filed at any time within six months after a composition has been confirmed, set the same aside and reinstate the case if it shall be made to appear upon a trial that fraud was practiced in the procuring of such composition, and that the knowledge thereof has come to the petitioners since the confirmation of such composition.

SEC. 14. DISCHARGES, WHEN GRANTED.—a Any person may, after the expiration of one month and within the next twelve months subsequent to being adjudged a bankrupt, file an application for a discharge in the court of bankruptcy in which the proceedings are pending; if it shall be made to appear to the judge that the bankrupt was unavoidably prevented from filing it within such time, it may be filed within but not after the expiration of the next six months.

b The judge shall hear the application for a discharge, and such proofs and pleas as may be made in opposition thereto by parties in interest, at such time as will give parties in interest a reasonable opportunity to be fully heard, and investigate the merits of the application and discharge the applicant unless he has (1) committed an offense punishable by imprisonment as herein provided; or (2) with intent to conceal his

financial condition, destroyed, concealed, or failed to keep books of account or records from which such condition might be ascertained; or (3) obtained property on credit from any person upon a materially false statement in writing made to such person for the purpose of obtaining such property on credit; or (4) at any time subsequent to the first day of the four months immediately preceding the filing of the petition transferred, removed, destroyed, or concealed, or permitted to be removed, destroyed, or concealed any of his property with the intent to hinder, delay, or defraud his creditors; or (5) in voluntary proceedings been granted a discharge in bankruptcy within six years; or (6) in the course of the proceedings in bankruptcy refused to obey any lawful order of or to answer any material question approved by the court.

c The confirmation of a composition shall discharge the bankrupt from his debts, other than those agreed to be paid by the terms of the composition and those not affected by a discharge.

SEC. 15. DISCHARGES, WHEN REVOKED.—a The judge may, upon the application of parties in interest who have not been guilty of undue laches, filed at any time within one year after a discharge shall have been granted, revoke it upon a trial if it shall be made to appear that it was obtained through the fraud of the bankrupt, and that the knowledge of the fraud has come to the petitioners since the granting of the discharge, and that the actual facts did not warrant the discharge.

SEC. 16. CO-DEBTORS OF BANKRUPTS.—a The liability of a person who is a co-debtor with, or guarantor or in manner surety for, a bankrupt shall not be altered by the discharge of such bankrupt.

SEC. 17. DEBTS NOT AFFECTED BY A DISCHARGE.—a A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as

(1) are due as a tax levied by the United States, the State, county, district, or municipality in which he resides;

(2) are liabilities for obtaining property by false pretenses or false representations, or for willful and malicious injuries to the person or property of another, or for alimony due or to become due, or for maintenance or support of wife or child, or for seduction of an unmarried female, or for criminal conversation;

(3) have not been duly scheduled in time for proof and allowance, with the name of the creditor if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy; or

(4) were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity.

CHAPTER IV.

COURTS AND PROCEDURE THEREIN.

SEC. 18. PROCESS, PLEADINGS, AND ADJUDICATIONS.— a Upon the filing of a petition for involuntary bankruptcy, service thereof, with a writ of subpoena, shall be made upon the person therein named as defendant in the same manner that service of such process is now had upon the commencement of a suit in equity in the courts of the United States, except that it shall be returnable within fifteen days, unless the judge shall for cause fix a longer time; but in case personal service can not be made, then notice shall be given by publication in the same manner and for the same time as provided by law for notice by publication in suits to enforce a legal or equitable lien in courts of the United States, except that, unless the judge shall otherwise direct, the order shall be published not more than once a week for two consecutive weeks, and the return day shall be ten days after the last publication, unless the judge shall for cause fix a longer time.

b The bankrupt, or any creditor, may appear and plead to the petition within five days after the return day, or within such further time as the court may allow.

c All pleadings setting up matters of fact shall be verified under oath.

d If the bankrupt, or any of his creditors, shall appear, within the time limited, and controvert the facts alleged in the petition, the judge shall determine, as soon as may be, the issues presented by the pleadings, without the intervention of a jury, except in

cases where a jury trial is given by this Act, and make the adjudication or dismiss the petition.

e If on the last day within which pleadings may be filed none are filed by the bankrupt or any of his creditors, the judge shall on the next day, if present, or as soon thereafter as practicable, make the adjudication or dismiss the petition.

f If the judge is absent from the district, or the division of the district in which the petition is pending, on the next day after the last day on which pleadings may be filed, and none have been filed by the bankrupt or any of his creditors, the clerk shall forthwith refer the case to the referee.

g Upon the filing of a voluntary petition the judge shall hear the petition and make the adjudication or dismiss the petition. If the judge is absent from the district, or the division of the district in which the petition is filed, at the time of the filing, the clerk shall forthwith refer the case to the referee.

SEC. 19. JURY TRIALS.—a A person against whom an involuntary petition has been filed shall be entitled to have a trial by jury, in respect to the question of his insolvency, except as herein otherwise provided, and any act of bankruptcy alleged in such petition to have been committed, upon filing a written application therefor at or before the time within which an answer may be filed. If such application is not filed within such time, a trial by jury shall be deemed to have been waived.

b If a jury is not in attendance upon the court, one may be specially summoned for the trial, or the case may be postponed, or, if the case is pending in one of the district courts within the jurisdiction of a circuit court of the United States, it may be certified for trial

to the circuit court sitting at the same place, or by consent of parties when sitting at any other place in the same district, if such circuit court has or is to have a jury first in attendance.

c The right to submit matters in controversy, or an alleged offense under this Act, to a jury shall be determined and enjoyed, except as provided by this Act, according to the United States laws now in force or such as may be hereafter enacted in relation to trials by jury.

SEC. 20. OATHS, AFFIRMATIONS.—a Oaths required by this Act, except upon hearings in court, may be administered by (1) referees; (2) officers authorized to administer oaths in proceedings before the courts of the United States, or under the laws of the State where the same are to be taken; and (3) diplomatic or consular officers of the United States in any foreign country.

b Any person conscientiously opposed to taking an oath may, in lieu thereof, affirm. Any person who shall affirm falsely shall be punished as for the making of a false oath.

SEC. 21. EVIDENCE.—a A court of bankruptcy may, upon application of any officer, bankrupt, or creditor, by order require any designated person, including the bankrupt and his wife, to appear in court or before a referee or the judge of any State court, to be examined concerning the acts, conduct, or property of a bankrupt whose estate is in process of administration under this Act: *Provided*, That the wife may be examined only touching business transacted by her or to which she is a party, and to determine the fact whether she has transacted or been a party to any business of the bankrupt.

b The right to take depositions in proceedings under this Act shall be determined and enjoyed according to the United States laws now in force, or such as may be hereafter enacted relating to the taking of depositions, except as herein provided.

c Notice of the taking of depositions shall be filed with the referee in every case. When depositions are to be taken in opposition to the allowance of a claim, notice shall also be served upon the claimant, and when in opposition to a discharge notice shall also be served upon the bankrupt.

d Certified copies of proceedings before a referee, or of papers, when issued by the clerk or referee, shall be admitted as evidence with like force and effect as certified copies of the records of district courts of the United States are now or may hereafter be admitted as evidence.

e A certified copy of the order approving the bond of a trustee shall constitute conclusive evidence of the vesting in him of the title to the property of the bankrupt, and if recorded shall impart the same notice that a deed from the bankrupt to the trustee if recorded would have imparted had not bankruptcy proceedings intervened.

f A certified copy of an order confirming or setting aside a composition, or granting or setting aside a discharge, not revoked, shall be evidence of the jurisdiction of the court, the regularity of the proceedings, and of the fact that the order was made.

g A certified copy of an order confirming a composition shall constitute evidence of the revesting of the title of his property in the bankrupt, and if recorded shall impart the same notice that a deed from the trustee to the bankrupt if recorded would impart.

SEC. 22. REFERENCE OF CASES AFTER ADJUDICATION.—a After a person has been adjudged a bankrupt the judge may cause the trustee to proceed with the administration of the estate, or refer it (1) generally to the referee or specially with only limited authority to act in the premises or to consider and report upon specified issues; or (2) to any referee within the territorial jurisdiction of the court, if the convenience of parties in interest will be served thereby, or for cause, or if the bankrupt does not do business, reside, or have his domicile in the district.

b The judge may, at any time, for the convenience of parties or for cause, transfer a case from one referee to another.

SEC. 23. JURISDICTION OF UNITED STATES AND STATE COURTS.—a The United States circuit courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings in bankruptcy, between trustees as such and adverse claimants concerning the property acquired or claimed by the trustees, in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants.

b Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant, except suits for the recovery of property under section sixty, sub-division b, and section sixty-seven, subdivision e.

c The United States circuit courts shall have concurrent jurisdiction with the courts of bankruptcy,

within their respective territorial limits, of the offenses enumerated in this Act.

SEC. 24. JURISDICTION OF APPELLATE COURTS.—

a The Supreme Court of the United States, the circuit courts of appeals of the United States, and the supreme courts of the Territories, in vacation in chambers and during their respective terms, as now or as they may be hereafter held, are hereby invested with appellate jurisdiction of controversies arising in bankruptcy proceedings from the courts of bankruptcy from which they have appellate jurisdiction in other cases. The Supreme Court of the United States shall exercise a like jurisdiction from courts of bankruptcy not within any organized circuit of the United States and from the supreme court of the District of Columbia.

b The several circuit courts of appeal shall have jurisdiction in equity, either interlocutory or final, to superintend and revise in matter of law the proceedings of the several inferior courts of bankruptcy within their jurisdiction. Such power shall be exercised on due notice and petition by any party aggrieved.

SEC. 25. APPEALS AND WRITS OF ERROR.—a That appeals, as in equity cases, may be taken in bankruptcy proceedings from the courts of bankruptcy to the circuit court of appeals of the United States, and to the supreme court of the Territories, in the following cases, to-wit,

(1) from a judgment adjudging or refusing to adjudge the defendant a bankrupt;

(2) from a judgment granting or denying a discharge; and

(3) from a judgment allowing or rejecting a debt or claim of five hundred dollars or over.

Such appeal shall be taken within ten days after

the judgment appealed from has been rendered, and may be heard and determined by the appellate court in term or vacation, as the case may be.

b From any final decision of a court of appeals, allowing or rejecting a claim under this Act, an appeal may be had under such rules and within such time as may be prescribed by the Supreme Court of the United States, in the following cases and no other:

1. Where the amount in controversy exceeds the sum of two thousand dollars, and the question involved is one which might have been taken on appeal or writ of error from the highest court of a State to the Supreme Court of the United States; or

2. Where some Justice of the Supreme Court of the United States shall certify that in his opinion the determination of the question or questions involved in the allowance or rejection of such claim is essential to a uniform construction of this Act throughout the United States.

c Trustees shall not be required to give bond when they take appeals or sue out writs of error.

d Controversies may be certified to the Supreme Court of the United States from other courts of the United States, and the former court may exercise jurisdiction thereof and issue writs of certiorari pursuant to the provisions of the United States laws now in force or such as may be hereafter enacted.

SEC. 26. ARBITRATION OF CONTROVERSIES.—a The trustee may, pursuant to the direction of the court, submit to arbitration any controversy arising in the settlement of the estate.

b Three arbitrators shall be chosen by mutual consent, or one by the trustee, one by the other party to the controversy, and the third by the two so chosen,

or if they fail to agree in five days after their appointment the court shall appoint the third arbitrator.

c The written finding of the arbitrators, or a majority of them, as to the issues presented, may be filed in court and shall have like force and effect as the verdict of a jury.

SEC. 27. COMPROMISES.—a The trustee may, with the approval of the court, compromise any controversy arising in the administration of the estate upon such terms as he may deem for the best interests of the estate.

SEC. 28. DESIGNATION OF NEWSPAPERS.—a Courts of bankruptcy shall by order designate a newspaper published within their respective territorial districts, and in the county in which the bankrupt resides or the major part of his property is situated, in which notices required to be published by this Act and orders which the court may direct to be published shall be inserted. Any court may in a particular case, for the convenience of parties in interest, designate some additional newspaper in which notices and orders in such case shall be published.

SEC. 29. OFFENSES.—a A person shall be punished, by imprisonment for a period not to exceed five years, upon conviction of the offense of having knowingly and fraudulently appropriated to his own use, embezzled, spent, or unlawfully transferred any property or secreted or destroyed any document belonging to a bankrupt estate which came into his charge as trustee.

b A person shall be punished, by imprisonment for a period not to exceed two years, upon conviction of the offense of having knowingly and fraudulently

(1) concealed while a bankrupt, or after his dis-

charge, from his trustee any of the property belonging to his estate in bankruptcy; or

(2) made a false oath or account in, or in relation to, any proceeding in bankruptcy;

(3) presented under oath any false claim for proof against the estate of a bankrupt, or used any such claim in composition personally or by agent, proxy, or attorney, or as agent, proxy, or attorney; or

(4) received any material amount of property from a bankrupt after the filing of the petition, with intent to defeat this Act; or

(5) extorted or attempted to extort any money or property from any person as a consideration for acting or forbearing to act in bankruptcy proceedings.

c A person shall be punished by fine, not to exceed five hundred dollars, and forfeit his office, and the same shall thereupon become vacant, upon conviction of the offense of having knowingly

(1) acted as a referee in a case in which he is directly or indirectly interested; or

(2) purchased, while a referee, directly or indirectly, any property of the estate in bankruptcy of which he is referee; or

(3) refused, while a referee or trustee, to permit a reasonable opportunity for the inspection of the accounts relating to the affairs of, and the papers and records of, estates in his charge by parties in interest when directed by the court so to do.

d A person shall not be prosecuted for any offense arising under this Act unless the indictment is found or the information is filed in court within one year after the commission of the offense.

SEC. 30. RULES, FORMS, AND ORDERS.—a All necessary rules, forms, and orders as to procedure and

for carrying this Act into force and effect shall be prescribed, and may be amended from time to time, by the Supreme Court of the United States.

SEC. 31. COMPUTATION OF TIME.—a Whenever time is enumerated by days in this Act, or in any proceeding in bankruptcy, the number of days shall be computed by excluding the first and including the last, unless the last fall on a Sunday or holiday, in which event the day last included shall be the next day thereafter which is not a Sunday or a legal holiday.

SEC. 32. TRANSFER OF CASES.—a In the event petitions are filed against the same person, or against different members of a partnership, in different courts of bankruptcy each of which has jurisdiction, the cases shall be transferred, by order of the courts relinquishing jurisdiction, to and be consolidated by the one of such courts which can proceed with the same for the greatest convenience of parties in interest.

CHAPTER V.
OFFICERS, THEIR DUTIES AND
COMPENSATION.

SEC. 33. CREATION OF TWO OFFICES.—a The offices of referee and trustee are hereby created.

SEC. 34. APPOINTMENT, REMOVAL, AND DISTRICTS OF REFEREES.—a Courts of bankruptcy shall, within the territorial limits of which they respectively have jurisdiction, (1) appoint referees, each for a term of two years, and may, in their discretion, remove them because their services are not needed or for other cause; and (2) designate, and from time to time change, the limits of the districts of referees, so that each county, where the services of a referee are needed, may constitute at least one district.

SEC. 35. QUALIFICATIONS OF REFEREES.—a Individuals shall not be eligible to appointment as referees unless they are respectively

(1) competent to perform the duties of that office; (2) not holding any office of profit or emolument under the laws of the United States or of any State other than commissioners of deeds, justices of the peace, masters in chancery, or notaries public;

(3) not related by consanguinity or affinity, within the third degree as determined by the common law, to any of the judges of the courts of bankruptcy or circuit courts of the United States, or of the justices or judges of the appellate courts of the districts wherein they may be appointed; and

(4) residents of, or have their offices in, the territorial districts for which they are to be appointed.

SEC. 36. OATHS OF OFFICE OF REFEREES.—

a Referees shall take the same oath of office as that prescribed for judges of United States courts.

SEC. 37. NUMBER OF REFEREES.—a Such number of referees shall be appointed as may be necessary to assist in expeditiously transacting the bankruptcy business pending in the various courts of bankruptcy.

SEC. 38. JURISDICTION OF REFEREES.—a Referees respectively are hereby invested, subject always to a review by the judge, within the limits of their districts as established from time to time, with jurisdiction to

(1) consider all petitions referred to them by the clerks and make the adjudications or dismiss the petitions;

(2) exercise the powers vested in courts of bankruptcy for the administering of oaths to and the examination of persons as witnesses and for requiring the production of documents in proceedings before them, except the power of commitment;

(3) exercise the powers of the judge for the taking possession and releasing of the property of the bankrupt in the event of the issuance by the clerk of a certificate showing the absence of a judge from the judicial district, or the division of the district, or his sickness, or inability to act;

(4) perform such part of the duties, except as to questions arising out of the applications of bankrupts, for compositions or discharges, as are by this Act conferred on courts of bankruptcy and as shall be prescribed by rules or orders of the courts of bankruptcy of their respective districts, except as herein otherwise provided; and

(5) upon the application of the trustee during the examination of the bankrupts, or other proceed-

ings, authorize the employment of stenographers at the expense of the estates at a compensation not to exceed ten cents per folio for reporting and transcribing the proceedings.

SEC. 39. DUTIES OF REFEREES.—a Referees shall

(1) declare dividends and prepare and deliver to trustees dividend sheets showing the dividends declared and to whom payable;

(2) examine all schedules of property and lists of creditors filed by bankrupts and cause such as are incomplete or defective to be amended;

(3) furnish such information concerning the estates in process of administration before them as may be requested by the parties in interest;

(4) give notices to creditors as herein provided;

(5) make up records embodying the evidence, or the substance thereof, as agreed upon by the parties in all contested matters arising before them, whenever requested to do so by either of the parties thereto, together with their findings therein, and transmit them to the judges;

(6) prepare and file the schedules of property and lists of creditors required to be filed by the bankrupts, or cause the same to be done, when the bankrupts fail, refuse, or neglect to do so;

(7) safely keep, perfect, and transmit to the clerks the records, herein required to be kept by them, when the cases are concluded;

(8) transmit to the clerks such papers as may be on file before them whenever the same are needed in any proceedings in courts, and in like manner secure the return of such papers after they have been used, or, if it be impracticable to transmit the original papers, transmit certified copies thereof by mail;

(9) upon application of any party in interest, preserve the evidence taken or the substance thereof as agreed upon by the parties before them when a stenographer is not in attendance; and

(10) whenever their respective offices are in the same cities or towns where the courts of bankruptcy convene, call upon and receive from the clerks all papers filed in courts of bankruptcy which have been referred to them.

b Referees shall not (1) act in cases in which they are directly or indirectly interested; (2) practice as attorneys and counselors at law in any bankruptcy proceedings; or (3) purchase, directly or indirectly, any property of an estate in bankruptcy.

SEC. 40. COMPENSATION OF REFEREES.—a Referees shall receive as full compensation for their services, payable after they are rendered, a fee of fifteen dollars deposited with the clerk at the time the petition is filed in each case, except when a fee is not required from a voluntary bankrupt, and twenty-five cents for every proof of claim filed for allowance, to be paid from the estate, if any, as a part of the cost of administration, and from estates which have been administered before them one per centum commissions on all moneys disbursed to creditors by the trustee, or one-half of one per centum on the amount to be paid to creditors upon the confirmation of a composition.

b Whenever a case is transferred from one referee to another the judge shall determine the proportion in which the fee and commissions therefor shall be divided between the referees.

c In the event of the reference of a case being revoked before it is concluded, and when the case is

specially referred, the judge shall determine what part of the fee and commissions shall be paid to the referee.

SEC. 41. CONTEMPTS BEFORE REFEREES.—a A person shall not, in proceedings before a referee, (1) disobey or resist any lawful order, process, or writ; (2) misbehave during a hearing or so near the place thereof as to obstruct the same; (3) neglect to produce, after having been ordered to do so, any pertinent document; or (4) refuse to appear after having been subpoenaed, or, upon appearing, refuse to take the oath as a witness, or, after having taken the oath, refuse to be examined according to law:

Provided, That no person shall be required to attend as a witness before a referee at a place outside of the State of his residence, and more than one hundred miles from such place of residence, and only in case his lawful mileage and fee for one day's attendance shall be first paid or tendered to him.

b The referee shall certify the facts to the judge, if any person shall do any of the things forbidden in this section. The judge shall thereupon, in a summary manner, hear the evidence as to the acts complained of, and, if it is such as to warrant him in so doing, punish such person in the same manner and to the same extent as for a contempt committed before the court of bankruptcy, or commit such person upon the same conditions as if the doing of the forbidden act had occurred with reference to the process of, or in the presence of, the court.

SEC. 42. RECORDS OF REFEREES.—a The records of all proceedings in each case before a referee shall be kept as nearly as may be in the same manner as records are now kept in equity cases in circuit courts of the United States.

b A record of the proceedings in each case shall be kept in a separate book or books, and shall, together with the papers on file, constitute the records of the case.

c The book or books containing a record of the proceedings shall, when the case is concluded before the referee, be certified to by him, and, together with such papers as are on file before him, be transmitted to the court of bankruptcy and shall there remain as a part of the records of the court.

SEC. 43. REFEREE'S ABSENCE OR DISABILITY.—a Whenever the office of a referee is vacant, or its occupant is absent or disqualified to act, the judge may act, or may appoint another referee, or another referee holding an appointment under the same court may, by order of the judge, temporarily fill the vacancy.

SEC. 44. APPOINTMENT OF TRUSTEES.—a The creditors of a bankrupt estate shall, at their first meeting after the adjudication or after a vacancy has occurred in the office of trustee, or after an estate has been reopened, or after a composition has been set aside or a discharge revoked, or if there is a vacancy in the office of trustee, appoint one trustee or three trustees of such estate. If the creditors do not appoint a trustee or trustees as herein provided, the court shall do so.

SEC. 45. QUALIFICATIONS OF TRUSTEES.—a Trustees may be (1) individuals who are respectively competent to perform the duties of that office, and reside or have an office in the judicial district within which they are appointed, or (2) corporations authorized by their charters or by law to act in such capacity and having an office in the judicial district within which they are appointed.

SEC. 46. DEATH OR REMOVAL OF TRUSTEES.—
a The death or removal of a trustee shall not abate any suit or proceeding which he is prosecuting or defending at the time of his death or removal, but the same may be proceeded with or defended by his joint trustee or successor in the same manner as though the same had been commenced or was being defended by such joint trustee alone or by such successor.

SEC. 47. DUTIES OF TRUSTEES.—a Trustees shall respectively

(1) account for and pay over to the estates under their control all interest received by them upon property of such estates;

(2) collect and reduce to money the property of the estates for which they are trustees, under the direction of the court, and close up the estate as expeditiously as is compatible with the best interests of the parties in interest;

(3) deposit all money received by them in one of the designated depositories;

(4) disburse money only by check or draft on the depositories in which it has been deposited;

(5) furnish such information concerning the estates of which they are trustees and their administration as may be requested by parties in interest;

(6) keep regular accounts showing all amounts received and from what sources and all amounts expended and on what accounts;

(7) lay before the final meeting of the creditors detailed statements of the administration of the estates;

(8) make final reports and file final accounts with the courts fifteen days before the days fixed for the final meetings of the creditors;

(9) pay dividends within ten days after they are declared by the referees;

(10) report to the courts, in writing, the condition of the estates and the amounts of money on hand, and such other details as may be required by the courts, within the first month after their appointment and every two months thereafter, unless otherwise ordered by the courts; and

(11) set apart the bankrupt's exemptions and report the items and estimated value thereof to the court as soon as practicable after their appointment.

b Whenever three trustees have been appointed for an estate, the concurrence of at least two of them shall be necessary to the validity of their every act concerning the administration of the estate.

c The trustee shall, within thirty days after the adjudication, file a certified copy of the decree of adjudication in the office where conveyances of real estate are recorded in every county where the bankrupt owns real estate not exempt from execution, and pay the fee for such filing, and he shall receive a compensation of fifty cents for each copy so filed, which, together with the filing fee, shall be paid out of the estate of the bankrupt as a part of the cost and disbursements of the proceedings.

SEC. 48. COMPENSATION OF TRUSTEES.—a Trustees shall receive for their services, payable after they are rendered, a fee of five dollars deposited with the clerk at the time the petition is filed in each case, except when a fee is not required from a voluntary bankrupt, and from estates which they have administered such commissions on all moneys disbursed by them as may be allowed by the courts, not to exceed six per centum on the first five hundred dollars or less,

four per centum on moneys in excess of five hundred dollars and less than fifteen hundred dollars, two per centum on moneys in excess of fifteen hundred dollars and less than ten thousand dollars, and one per centum on moneys in excess of ten thousand dollars. And in case of the confirmation of a composition after the trustee has qualified the court may allow him, as compensation, not to exceed one-half of one per centum of the amount to be paid the creditors on such composition.

b In the event of an estate being administered by three trustees instead of one trustee or by successive trustees, the court shall apportion the fees and commissions between them according to the services actually rendered, so that there shall not be paid to trustees for the administering of any estate a greater amount than one trustee would be entitled to.

c The court may, in its discretion, withhold all compensation from any trustee who has been removed for cause.

SEC. 49. ACCOUNTS AND PAPERS OF TRUSTEES.—

a The accounts and papers of trustees shall be open to the inspection of officers and all parties in interest.

SEC. 50. BONDS OF REFEREES AND TRUSTEES.—

a Referees, before assuming the duties of their offices, and within such time as the district courts of the United States having jurisdiction shall prescribe, shall respectively qualify by entering into bond to the United States in such sum as shall be fixed by such courts, not to exceed five thousand dollars, with such sureties as shall be approved by such courts, conditioned for the faithful performance of their official duties.

b Trustees before entering upon the performance of their official duties, and within ten days after their

appointment, or within such further time, not to exceed five days, as the court may permit, shall respectively qualify by entering into bond to the United States, with such sureties as shall be approved by the courts, conditioned for the faithful performance of their official duties.

c The creditors of a bankrupt estate, at their first meeting after the adjudication, or after a vacancy has occurred in the office of trustee, or after an estate has been reopened, or after a composition has been set aside or a discharge revoked, if there is a vacancy in the office of trustee, shall fix the amount of the bond of the trustee; they may at any time increase the amount of the bond. If the creditors do not fix the amount of the bond of the trustee as herein provided the court shall do so.

d The court shall require evidence as to the actual value of the property of sureties.

e There shall be at least two sureties upon each bond.

f The actual value of the property of the sureties, over and above their liabilities and exemptions, on each bond shall equal at least the amount of such bond.

g Corporations organized for the purpose of becoming sureties upon bonds, or authorized by law to do so, may be accepted as sureties upon the bonds of referees and trustees whenever the courts are satisfied that the rights of all parties in interest will be thereby amply protected.

h Bonds of referees, trustees, and designated depositories shall be filed of record in the office of the clerk of the court and may be sued upon in the name of the United States for the use of any person injured by a breach of their conditions.

i Trustees shall not be liable, personally or on their bonds, to the United States, for any penalties or forfeitures incurred by the bankrupts under this Act, of whose estates they are respectively trustees.

j Joint trustees may give joint or several bonds.

k If any referee or trustee shall fail to give bond, as herein provided and within the time limited, he shall be deemed to have declined his appointment, and such failure shall create a vacancy in his office.

l Suits upon referees' bonds shall not be brought subsequent to two years after the alleged breach of the bond.

m Suits upon trustees' bonds shall not be brought subsequent to two years after the estate has been closed.

SEC. 51. DUTIES OF CLERKS.—a Clerks shall respectively

(1) account for, as for other fees received by them, the clerk's fee paid in each case and such other fees as may be received for certified copies of records which may be prepared for persons other than officers;

(2) collect the fees of the clerk, referee, and trustee in each case instituted before filing the petition, except the petition of a proposed voluntary bankrupt which is accompanied by an affidavit stating that the petitioner is without, and can not obtain, the money with which to pay such fees;

(3) deliver to the referees upon application all papers which may be referred to them, or, if the offices of such referees are not in the same cities or towns as the offices of such clerks, transmit such papers by mail, and in like manner return papers which were received from such referees after they have been used;

(4) and within ten days after each case has been closed pay to the referee, if the case was referred, the

fee collected for him, and to the trustee the fee collected for him at the time of filing the petition.

SEC. 52. COMPENSATION OF CLERKS AND MARSHALS.—a Clerks shall respectively receive as full compensation for their services to each estate, a filing fee of ten dollars, except when a fee is not required from a voluntary bankrupt.

b Marshals shall respectively receive from the estate where an adjudication in bankruptcy is made, except as herein otherwise provided, for the performance of their services in proceedings in bankruptcy, the same fees, and account for them in the same way, as they are entitled to receive for the performance of the same or similar services in other cases in accordance with laws now in force, or such as may be hereafter enacted fixing the compensation of marshals.

SEC. 53. DUTIES OF ATTORNEY-GENERAL.—a The Attorney-General shall annually lay before Congress statistical tables showing for the whole country, and by States, the number of cases during the year of voluntary and involuntary bankruptcy; the amount of the property of the estates; the dividends paid and the expenses of administering such estates; and such other like information as he may deem important.

SEC. 54. STATISTICS OF BANKRUPTCY PROCEEDINGS.—a Officers shall furnish in writing and transmit by mail such information as is within their knowledge, and as may be shown by the records and papers in their possession, to the Attorney-General, for statistical purposes, within ten days after being requested by him to do so.

CHAPTER VI.

CREDITORS.

SEC. 55. MEETINGS OF CREDITORS.—a The court shall cause the first meeting of the creditors of a bankrupt to be held, not less than ten nor more than thirty days after the adjudication, at the county seat of the county in which the bankrupt has had his principal place of business, resided, or had his domicile; or if that place would be manifestly inconvenient as a place of meeting for the parties in interest, or if the bankrupt is one who does not do business, reside, or have his domicile within the United States, the court shall fix a place for the meeting which is the most convenient for parties in interest. If such meeting should by any mischance not be held within such time, the court shall fix the date, as soon as may be thereafter, when it shall be held.

b At the first meeting of creditors the judge or referee shall preside, and, before proceeding with the other business, may allow or disallow the claims of creditors there presented, and may publicly examine the bankrupt or cause him to be examined at the instance of any creditor.

c The creditors shall at each meeting take such steps as may be pertinent and necessary for the promotion of the best interests of the estate and the enforcement of this Act.

d A meeting of creditors, subsequent to the first one, may be held at any time and place when all of the creditors who have secured the allowance of their

claims sign a written consent to hold a meeting at such time and place.

e The court shall call a meeting of creditors whenever one-fourth or more in number of those who have proven their claims shall file a written request to that effect; if such request is signed by a majority of claims, and contains a request for such meeting to be held at a designated place, the court shall call such meeting at such place within thirty days after the date of the filing of the request.

f Whenever the affairs of the estate are ready to be closed a final meeting of creditors shall be ordered.

SEC. 56. VOTERS AT MEETINGS OF CREDITORS.—a Creditors shall pass upon matters submitted to them at their meetings by a majority vote in number and amount of claims of all creditors whose claims have been allowed and are present, except as herein otherwise provided.

b Creditors holding claims which are secured or have priority shall not, in respect to such claims, be entitled to vote at creditors' meetings, nor shall such claims be counted in computing either the number of creditors or the amount of their claims, unless the amounts of such claims exceed the values of such securities or priorities, and then only for such excess.

SEC. 57. PROOF AND ALLOWANCE OF CLAIMS.—a Proof of claims shall consist of a statement under oath, in writing, signed by a creditor setting forth the claim, the consideration therefor, and whether any, and, if so what, securities are held therefor, and whether any, and, if so what, payments have been made thereon, and that the sum claimed is justly owing from the bankrupt to the creditor.

b Whenever a claim is founded upon an instrument

of writing, such instrument, unless lost or destroyed, shall be filed with the proof of claim. If such instrument is lost or destroyed, a statement of such fact and of the circumstances of such loss or destruction shall be filed under oath with the claim. After the claim is allowed or disallowed, such instrument may be withdrawn by permission of the court, upon leaving a copy thereof on file with the claim.

c Claims after being proved may, for the purpose of allowance, be filed by the claimants in the court where the proceedings are pending or before the referee if the case has been referred.

d Claims which have been duly proved shall be allowed, upon receipt by or upon presentation to the court, unless objection to their allowance shall be made by parties in interest, or their consideration be continued for cause by the court upon its own motion.

e Claims of secured creditors and those who have priority may be allowed to enable such creditors to participate in the proceedings at creditors' meetings held prior to the determination of the value of their securities or priorities, but shall be allowed for such sums only as to the courts seem to be owing over and above the value of their securities or priorities.

f Objections to claims shall be heard and determined as soon as the convenience of the court and the best interests of the estates and the claimants will permit.

g The claims of creditors who have received preferences, voidable under section sixty, subdivision b, or to whom conveyances, transfers, assignments, or incumbrances, void or voidable under section sixty-seven, subdivision e, have been made or given, shall not be allowed unless such creditors shall surrender

such preferences, conveyances, transfers, assignments, or incumbrances.

h The value of securities held by secured creditors shall be determined by converting the same into money according to the terms of the agreement pursuant to which such securities were delivered to such creditors or by such creditors and the trustee, by agreement, arbitration, compromise, or litigation, as the court may direct, and the amount of such value shall be credited upon such claims, and a dividend shall be paid only on the unpaid balance.

i Whenever a creditor, whose claim against a bankrupt estate is secured by the individual undertaking of any person, fails to prove such claim, such person may do so in the creditor's name, and if he discharge such undertaking in whole or in part he shall be subrogated to that extent to the rights of the creditor.

j Debts owing to the United States, a State, a county, a district, or a municipality as a penalty or forfeiture shall not be allowed, except for the amount of the pecuniary loss sustained by the act, transaction, or proceeding out of which the penalty or forfeiture arose, with reasonable and actual costs occasioned thereby and such interest as may have accrued thereon according to law.

k Claims which have been allowed may be reconsidered for cause and reallowed or rejected in whole or in part, according to the equities of the case, before but not after the estate has been closed.

l Whenever a claim shall have been reconsidered and rejected, in whole or in part, upon which a dividend has been paid, the trustee may recover from the creditor the amount of the dividend received upon the claim if rejected in whole, or the proportional part thereof if rejected only in part.

m The claim of any estate which is being administered in bankruptcy against any like estate may be proved by the trustee and allowed by the court in the same manner and upon like terms as the claims of other creditors.

n Claims shall not be proved against a bankrupt estate subsequent to one year after the adjudication; or if they are liquidated by litigation and the final judgment therein is rendered within thirty days before or after the expiration of such time, then within sixty days after the rendition of such judgment: *Provided*, That the right of infants and insane persons without guardians, without notice of the proceedings, may continue six months longer.

SEC. 58. NOTICES TO CREDITORS.—a Creditors shall have at least ten days' notice by mail, to their respective addresses as they appear in the list of creditors of the bankrupt, or as afterwards filed with the papers in the case by the creditors, unless they waive notice in writing of

- (1) all examinations of the bankrupt;
- (2) all hearings upon applications for the confirmation of compositions or the discharge of bankrupts;
- (3) all meetings of creditors;
- (4) all proposed sales of property;
- (5) the declaration and time of payment of dividends;
- (6) the filing of the final accounts of the trustee, and the time when and the place where they will be examined and passed upon;
- (7) the proposed compromise of any controversy, and
- (8) the proposed dismissal of the proceedings.

b Notice to creditors of the first meeting shall be

published at least once and may be published such number of additional times as the court may direct; the last publication shall be at least one week prior to the date fixed for the meeting. Other notices may be published as the court shall direct.

c All notices shall be given by the referee, unless otherwise ordered by the judge.

SEC. 59. WHO MAY FILE AND DISMISS PETITION.—

a Any qualified person may file a petition to be adjudged a voluntary bankrupt.

b Three or more creditors who have provable claims against any person which amount in the aggregate, in excess of the value of securities held by them, if any, to five hundred dollars or over; or if all of the creditors of such person are less than twelve in number, then one of such creditors whose claim equals such amount may file a petition to have him adjudged a bankrupt.

c Petitions shall be filed in duplicate, one copy for the clerk and one for service on the bankrupt.

d If it be averred in the petition that the creditors of the bankrupt are less than twelve in number, and less than three creditors have joined as petitioners therein, and the answer avers the existence of a larger number of creditors, there shall be filed with the answers a list under oath of all the creditors, with their addresses, and thereupon the court shall cause all such creditors to be notified of the pendency of such petition and shall delay the hearing upon such petition for a reasonable time, to the end that parties in interest shall have an opportunity to be heard; if upon such hearing it shall appear that a sufficient number have joined in such petition, or if prior to or during such hearing a sufficient number shall join therein, the case may be proceeded with, but otherwise it shall be dismissed.

e In computing the number of creditors of a bankrupt for the purpose of determining how many creditors must join in the petition, such creditors as were employed by him at the time of the filing of the petition or are related to him by consanguinity or affinity within the third degree, as determined by the common law, and have not joined in the petition, shall not be counted.

f Creditors other than original petitioners may at any time enter their appearance and join in the petition, or file an answer and be heard in opposition to the prayer of the petition.

g A voluntary or involuntary petition shall not be dismissed by the petitioner or petitioners or for want of prosecution or by consent of parties until after notice to the creditors.

SEC. 60. PREFERRED CREDITORS.—a A person shall be deemed to have given a preference if, being insolvent, he has, within four months before the filing of the petition, or after the filing of the petition and before the adjudication, procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class. Where the preference consists in a transfer, such period of four months shall not expire until four months after the date of the recording or registering of the transfer, if by law such recording or registering is required.

b If a bankrupt shall have given a preference, and the person receiving it, or to be benefited thereby, or his agent acting therein, shall have had reasonable

cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee, and he may recover the property or its value from such person. And, for the purpose of such recovery, any court of bankruptcy, as hereinbefore defined, and any State court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction.

c If a creditor has been preferred, and afterwards in good faith gives the debtor further credit without security of any kind for property which becomes a part of the debtor's estates, the amount of such new credit remaining unpaid at the time of the adjudication in bankruptcy may be set off against the amount which would otherwise be recoverable from him.

d If a debtor shall, directly or indirectly, in contemplation of the filing of a petition by or against him, pay money or transfer property to an attorney and counselor at law, solicitor in equity, or proctor in admiralty for services to be rendered, the transaction shall be re-examined by the court on petition of the trustee or any creditor and shall only be held valid to the extent of a reasonable amount to be determined by the court, and the excess may be recovered by the trustee for the benefit of the estate.

CHAPTER VII.

ESTATES.

SEC. 61. DEPOSITORIES FOR MONEY.—a Courts of bankruptcy shall designate, by order, banking institutions as depositories for the money of bankrupt estates, as convenient as may be to the residences of trustees, and shall require bonds to the United States, subject to their approval, to be given by such banking institutions, and may from time to time, as occasion may require, by like order increase the number of depositories or the amount of any bond, or change such depositories.

SEC. 62. EXPENSES OF ADMINISTERING ESTATES.—a The actual and necessary expenses incurred by officers in the administration of estates shall, except where other provisions are made for their payment, be reported in detail, under oath, and examined and approved or disapproved by the court. If approved, they shall be paid or allowed out of the estates in which they were incurred.

SEC. 63. DEBTS WHICH MAY BE PROVED.—a Debts of the bankrupt may be proved and allowed against his estate which are

(1) a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest;

(2) due as costs taxable against an involuntary

bankrupt who was at the time of the filing of the petition against him plaintiff in a cause of action which would pass to the trustee and which the trustee declines to prosecute after notice;

(3) founded upon a claim for taxable costs incurred in good faith by a creditor before the filing of the petition in an action to recover a provable debt;

(4) founded upon an open account, or upon a contract express or implied; and

(5) founded upon provable debts reduced to judgments after the filing of the petition and before the consideration of the bankrupt's application for a discharge, less costs incurred and interests accrued after the filing of the petition and up to the time of the entry of such judgments.

b Unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against his estate.

SEC. 64. DEBTS WHICH HAVE PRIORITY.—a The court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, State, county, district, or municipality in advance of the payment of dividends to creditors, and upon filing the receipts of the proper public officers for such payment he shall be credited with the amount thereof, and in case any question arises as to the amount or legality of any such tax the same shall be heard and determined by the court.

b The debts, to have priority, except as herein provided, and to be paid in full out of bankrupt estates, and the order of payment shall be

(1) the actual and necessary cost of preserving the estate subsequent to filing the petition;

(2) the filing fees paid by creditors in involuntary cases, and where property of the bankrupt, transferred or concealed by him either before or after the filing of the petition, shall have been recovered for the benefit of the estate of the bankrupt by the efforts and at the expense of one or more creditors, the reasonable expenses of such recovery;

(3) The cost of administration, including the fees and mileage payable to witnesses as now or hereafter provided by the laws of the United States, and one reasonable attorney's fee, for the professional services actually rendered, irrespective of the number of attorneys employed, to the petitioning creditors in involuntary cases, to the bankrupt in involuntary cases while performing the duties herein prescribed, and to the bankrupt in voluntary cases, as the court may allow;

(4) wages due to workmen, clerks, traveling or city salesmen, or servants, which have been earned within three months before the date of commencement of proceedings, not to exceed three hundred dollars to each claimant.

(5) debts owing to any person who by the laws of the State or the United States is entitled to priority.

c In the event of the confirmation of a composition being set aside, or a discharge revoked, the property acquired by the bankrupt in addition to his estate at the time the composition was confirmed or the adjudication was made shall be applied to the payment in full of the claims of creditors for property sold to him on credit, in good faith, while such composition or discharge was in force, and the residue, if any, shall be applied to the payment of the debts which were owing at the time of the adjudication.

SEC. 65. DECLARATION AND PAYMENT OF DIVIDENDS.—a Dividends of an equal per centum shall be declared and paid on all allowed claims, except such as have priority or are secured.

b The first dividend shall be declared within thirty days after the adjudication, if the money of the estate in excess of the amount necessary to pay the debts which have priority and such claims as have not been, but probably will be, allowed equals five per centum or more of such allowed claims. Dividends subsequent to the first shall be declared upon like terms as the first and as often as the amount shall equal ten per centum or more and upon closing the estate. Dividends may be declared oftener and in smaller proportions if the judge shall so order: *Provided*, That the first dividend shall not include more than fifty per centum of the money of the estate in excess of the amount necessary to pay the debts which have priority and such claims as probably will be allowed: *And provided further*, That the final dividend shall not be declared within three months after the first dividend shall be declared.

c The rights of creditors who have received dividends, or in whose favor final dividends have been declared, shall not be affected by the proof and allowance of claims subsequent to the date of such payment or declarations of dividends; but the creditors proving and securing the allowance of such claims shall be paid dividends equal in amount to those already received by the other creditors if the estate equals so much before such other creditors are paid any further dividends.

d Whenever a person shall have been adjudged a bankrupt by a court without the United States and

also by a court of bankruptcy, creditors residing within the United States shall first be paid a dividend equal to that received in the court without the United States by other creditors before creditors who have received a dividend in such courts shall be paid any amounts.

e A claimant shall not be entitled to collect from a bankrupt estate any greater amount than shall accrue pursuant to the provisions of this Act.

SEC. 66. UNCLAIMED DIVIDENDS.—a Dividends which remain unclaimed for six months after the final dividend has been declared shall be paid by the trustee into court.

b Dividends remaining unclaimed for one year shall, under the direction of the court, be distributed to the creditors whose claims have been allowed but not paid in full, and after such claims have been paid in full the balance shall be paid to the bankrupt: *Provided*, That in case unclaimed dividends belong to minors such minors may have one year after arriving at majority to claim such dividends.

SEC. 67. LIENS.—a Claims which for want of record or for other reasons would not have been valid liens as against the claims of the creditors of the bankrupt shall not be liens against his estate.

b Whenever a creditor is prevented from enforcing his rights as against a lien created, or attempted to be created, by his debtor, who afterwards becomes a bankrupt, the trustee of the estate of such bankrupt shall be subrogated to and may enforce such rights of such creditor for the benefit of the estate.

c A lien created by or obtained in or pursuant to any suit or proceeding at law or in equity, including an attachment upon mesne process or a judgment by

confession, which was begun against a person within four months before the filing of a petition in bankruptcy by or against such person shall be dissolved by the adjudication of such person to be a bankrupt if

(1) it appears that said lien was obtained and permitted while the defendant was insolvent and that its existence and enforcement will work a preference, or

(2) the party or parties to be benefited thereby had reasonable cause to believe the defendant was insolvent and in contemplation of bankruptcy, or

(3) that such lien was sought and permitted in fraud of the provisions of this Act;

or if the dissolution of such lien would militate against the best interests of the estate of such person the same shall not be dissolved, but the trustee of the estate of such person, for the benefit of the estate, shall be subrogated to the rights of the holder of such lien and empowered to perfect and enforce the same in his name as trustee with like force and effect as such holder might have done had not bankruptcy proceedings intervened.

d Liens given or accepted in good faith and not in contemplation of or in fraud upon this Act, and for a present consideration, which have been recorded according to law, if record thereof was necessary in order to impart notice, shall not be affected by this Act.

e That all conveyances, transfers, assignments, or incumbrances of his property, or any part thereof, made or given by a person adjudged a bankrupt under the provisions of this Act subsequent to the passage of this Act and within four months prior to the filing of the petition, with the intent and purpose on his part to hinder, delay, or defraud his creditors, or any of them, shall be null and void as against the creditors of

such debtor, except as to purchasers in good faith and for a present fair consideration; and all property of the debtor conveyed, transferred, assigned, or encumbered as aforesaid shall, if he be adjudged a bankrupt, and the same is not exempt from execution and liability for debts by the law of his domicile, be and remain a part of the assets and estate of the bankrupt and shall pass to his said trustee, whose duty it shall be to recover and reclaim the same by legal proceedings or otherwise for the benefit of the creditors. And all conveyances, transfers, or incumbrances of his property made by a debtor at any time within four months prior to the filing of the petition against him, and while insolvent, which are held null and void as against the creditors of such debtor by the laws of the State, Territory, or District in which such property is situate, shall be deemed null and void under this Act against the creditors of such debtor if he be adjudged a bankrupt, and such property shall pass to the assignee and be by him reclaimed and recovered for the benefit of the creditors of the bankrupt. For the purpose of such recovery any court of bankruptcy as hereinbefore defined, and any State court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction.

f That all levies, judgments, attachments, or other liens, obtained through legal proceedings, against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the

estate of the bankrupt, unless the court shall, on due notice, order that the right under such levy, judgment, attachment, or other lien shall be preserved for the benefit of the estate; and thereupon the same may pass to and shall be preserved by the trustee for the benefit of the estate as aforesaid. And the court may order such conveyance as shall be necessary to carry the purposes of this section into effect: *Provided*, That nothing herein contained shall have the effect to destroy or impair the title obtained by such levy, judgment, attachment, or other lien, of a bona fide purchaser for value who shall have acquired the same without notice or reasonable cause for inquiry.

SEC. 68. SET-OFFS AND COUNTERCLAIMS.—a In all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor the account shall be stated and one debt shall be set off against the other, and the balance only shall be allowed or paid.

b A set-off or counterclaim shall not be allowed in favor of any debtor of the bankrupt which (1) is not provable against the estate; or (2) was purchased by or transferred to him after the filing of the petition, or within four months before such filing, with a view to such use and with knowledge or notice that such bankrupt was insolvent, or had committed an act of bankruptcy.

SEC. 69. POSSESSION OF PROPERTY.—a A judge may, upon satisfactory proof, by affidavit, that a bankrupt against whom an involuntary petition has been filed and is pending has committed an act of bankruptcy or has neglected or is neglecting, or is about to so neglect his property that it has thereby deteriorated or is thereby deteriorating or is about thereby to deteriorate in value, issue a warrant to the marshal to

seize and hold it subject to further orders. Before such warrant is issued the petitioners applying therefor shall enter into a bond in such an amount as the judge shall fix, with such sureties as he shall approve, conditioned to indemnify such bankrupt for such damages as he shall sustain in the event such seizure shall prove to have been wrongfully obtained. Such property shall be released, if such bankrupt shall give bond in a sum which shall be fixed by the judge, with such sureties as he shall approve, conditioned to turn over such property, or pay the value thereof in money to the trustee, in the event he is adjudged a bankrupt pursuant to such petition.

SEC. 70. TITLE TO PROPERTY.—a The trustee of the estate of a bankrupt, upon his appointment and qualification, and his successor or successors, if he shall have one or more, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt, except in so far as it is to property which is exempt, to all

- (1) documents relating to his property;
- (2) interests in patents, patent rights, copyrights, and trade-marks;
- (3) powers which he might have exercised for his own benefit, but not those which he might have exercised for some other person;
- (4) property transferred by him in fraud of his creditors;
- (5) property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him:

Provided, That when any bankrupt shall have

any insurance policy which has a cash surrender value payable to himself, his estate, or personal representatives, he may, within thirty days after the cash surrender value has been ascertained and stated to the trustee by the company issuing the same, pay or secure to the trustee the sum so ascertained and stated, and continue to hold, own, and carry such policy free from the claims of the creditors participating in the distribution of his estate under the bankruptcy proceedings, otherwise the policy shall pass to the trustee as assets; and

(6) rights of action arising upon contracts or from the unlawful taking or detention of, or injury to, his property.

b All real and personal property belonging to bankrupt estates shall be appraised by three disinterested appraisers; they shall be appointed by, and report to, the court. Real and personal property shall, when practicable, be sold subject to the approval of the court; it shall not be sold otherwise than subject to the approval of the court for less than seventy-five per centum of its appraised value.

c The title to property of a bankrupt estate which has been sold, as herein provided, shall be conveyed to the purchaser by the trustee.

d Whenever a composition shall be set aside, or discharge revoked, the trustee shall, upon his appointment and qualification, be vested as herein provided with the title to all of the property of the bankrupt as of the date of the final decree setting aside the composition or revoking the discharge.

e The trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, and may recover the

property so transferred, or its value, from the person to whom it was transferred, unless he was a bona fide holder for value prior to the date of the adjudication. Such property may be recovered or its value collected from whoever may have received it, except a bona fide holder for value. For the purpose of such recovery any court of bankruptcy as hereinbefore defined, and any State court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction.

f Upon the confirmation of a composition offered by a bankrupt, the title to his property shall thereupon revest in him.

THE TIME WHEN THIS ACT SHALL GO INTO EFFECT.

[71] a This Act shall go into full force and effect upon its passage: *Provided, however,* That no petition for voluntary bankruptcy shall be filed within one month of the passage thereof, and no petition for involuntary bankruptcy shall be filed within four months of the passage thereof.

b Proceedings commenced under State insolvency laws before the passage of this Act shall not be affected by it.

[72] SEC. 71. That the clerks of the several district courts of the United States shall prepare and keep in their respective offices complete and convenient indexes of all petitions and discharges in bankruptcy heretofore or hereafter filed in the said courts, and shall, when requested so to do, issue certificates of search certifying as to whether or not any such petitions or discharges have been filed; and said clerks shall be entitled to receive for such certificates the same fees as now allowed by law for certificates as to judgments in said courts: *Provided,* That said bankruptcy indexes

and dockets shall at all times be open to inspection and examination by all persons or corporations without any fee or charge therefor.

[73] SEC. 72. That neither the referee nor the trustee shall in any form or guise receive, nor shall the court allow them, any other or further compensation for their services than that expressly authorized and prescribed in this Act.

[74] SEC. 19. That the provisions of this amendatory Act shall not apply to bankruptcy cases pending when this Act takes effect, but such cases shall be adjudicated and disposed of conformably to the provisions of the said Act of July first, eighteen hundred and ninety-eight.

Original Act approved July 1, 1898.

Amendment approved February 5, 1903.

GENERAL ORDERS IN BANKRUPTCY

PROMULGATED BY THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1898.

[75] In pursuance of the powers conferred by the Constitution and laws upon the Supreme Court of the United States, and particularly by the act of Congress approved July 1, 1898, entitled "An Act to establish a uniform system of bankruptcy throughout the United States," it is ordered, on this 28th day of November, 1898, that the following rules be adopted and established as general orders in bankruptcy, to take effect on the first Monday, being the second day, of January, 1899. And it is further ordered that all proceedings

in bankruptcy had before that day, in accordance with the act last aforesaid, and being in substantial conformity either with the provisions of these general orders, or else with the general orders established by this court under the bankrupt act of 1867 and with any general rules or special orders of the courts in bankruptcy, stand good, subject, however, to such further regulation by rule or order of those courts as may be necessary or proper to carry into force and effect the bankrupt act of 1898 and the general orders of this court.

I. DOCKET.

[76] The clerk shall keep a docket, in which the cases shall be entered and numbered in the order in which they are commenced. It shall contain a memorandum of the filing of the petition and of the action of the court thereon, of the reference of the case to the referee, and of the transmission by him to the clerk of his certified record of the proceedings, with the dates thereof, and a memorandum of all proceedings in the case except those duly entered on the referee's certified record aforesaid. The docket shall be arranged in a manner convenient for reference, and shall at all times be open to public inspection.

II. FILING OF PAPERS.

[77] The clerk or the referee shall indorse on each paper filed with him the day and hour of filing, and a brief statement of its character.

III. PROCESS.

[78] All process, summons and subpoenas shall issue out of the court, under the seal thereof, and be

tested by the clerk; and blanks, with the signature of the clerk and seal of the court, may, upon application, be furnished to the referees.

IV. CONDUCT OF PROCEEDINGS.

[79] Proceedings in bankruptcy may be conducted by the bankrupt in person in his own behalf, or by a petitioning or opposing creditor; but a creditor will only be allowed to manage before the court his individual interest. Every party may appear and conduct the proceedings by attorney, who shall be an attorney or counsellor authorized to practice in the circuit or district court. The name of the attorney or counsellor, with his place of business, shall be entered upon the docket, with the date of the entry. All papers or proceedings offered by an attorney to be filed shall be indorsed as above required, and orders granted on motion shall contain the name of the party or attorney making the motion. Notices and orders which are not, by the act or by these general orders, required to be served on the party personally may be served upon his attorney.

V. FRAME OF PETITIONS.

[80] All petitions and the schedules filed therewith shall be printed or written out plainly, without abbreviation or interlineation, except where such abbreviation and interlineation may be for the purpose of reference.

VI. PETITIONS IN DIFFERENT DISTRICTS.

[81] In case two or more petitions shall be filed against the same individual in different districts, the first hearing shall be had in the district in which the debtor has his domicile, and the petition may be

amended by inserting an allegation of an act of bankruptcy committed at an earlier date than that first alleged, if such earlier act is charged in either of the other petitions; and in case of two or more petitions against the same partnership in different courts, each having jurisdiction over the case, the petition first filed shall be first heard, and may be amended by the insertion of an allegation of an earlier act of bankruptcy than that first alleged, if such earlier act is charged in either of the other petitions; and, in either case, the proceedings upon the other petitions may be stayed until an adjudication is made upon the petition first heard; and the court which makes the first adjudication of bankruptcy shall retain jurisdiction over all proceedings therein until the same shall be closed. In case two or more petitions shall be filed in different districts by different members of the same partnership for an adjudication of the bankruptcy of said partnership, the court in which the petition is first filed, having jurisdiction, shall take and retain jurisdiction over all proceedings in such bankruptcy until the same shall be closed; and if such petitions shall be filed in the same district, action shall be first had upon the one first filed. But the court so retaining jurisdiction shall, if satisfied that it is for the greatest convenience of parties in interest that another of said courts should proceed with the cases, order them to be transferred to that court.

VII. PRIORITY OF PETITIONS.

[82] Whenever two or more petitions shall be filed by creditors against a common debtor, alleging separate acts of bankruptcy committed by said debtor on different days within four months prior to the filing

of said petitions, and the debtor shall appear and show cause against an adjudication of bankruptcy against him on the petitions, that petition shall be first heard and tried which alleges the commission of the earliest act of bankruptcy; and in case the several acts of bankruptcy are alleged in the different petitions to have been committed on the same day, the court before which the same are pending may order them to be consolidated, and proceed to a hearing as upon one petition; and if an adjudication of bankruptcy be made upon either petition, or for the commission of a single act of bankruptcy, it shall not be necessary to proceed to a hearing upon the remaining petitions, unless proceedings be taken by the debtor for the purpose of causing such adjudication to be annulled or vacated.

VIII. PROCEEDINGS IN PARTNERSHIP CASES.

[83] Any member of a partnership, who refuses to join in a petition to have the partnership declared bankrupt, shall be entitled to resist the prayer of the petition in the same manner as if the petition had been filed by a creditor of the partnership, and notice of the filing of the petition shall be given to him in the same manner as provided by law and by these rules in the case of a debtor petitioned against; and he shall have the right to appear at the time fixed by the court for the hearing of the petition, and to make proof, if he can, that the partnership is not insolvent or has not committed an act of bankruptcy, and to make all defenses which any debtor proceeded against is entitled to take by the provisions of the act; and in case an adjudication of bankruptcy is made upon the petition, such partner shall be required to file a schedule of his

debts and an inventory of his property in the same manner as is required by the act in cases of debtors against whom adjudication of bankruptcy shall be made

IX. SCHEDULE IN INVOLUNTARY BANKRUPTCY.

[84] In all cases of involuntary bankruptcy in which the bankrupt is absent or can not be found, it shall be the duty of the petitioning creditor to file, within five days after the date of the adjudication, a schedule giving the names and places of residence of all the creditors of the bankrupt, according to the best information of the petitioning creditor. If the debtor is found, and is served with notice to furnish a schedule of his creditors and fails to do so, the petitioning creditor may apply for an attachment against the debtor, or may himself furnish such schedule as aforesaid.

X. INDEMNITY FOR EXPENSES.

[85] Before incurring any expense in publishing or mailing notices, or in travelling, or in procuring the attendance of witnesses, or in perpetuating testimony, the clerk, marshal or referee may require, from the bankrupt or other person in whose behalf the duty is to be performed, indemnity for such expense. Money advanced for this purpose by the bankrupt or other person shall be repaid him out of the estate as part of the cost of administering the same.

XI. AMENDMENTS.

[86] The court may allow amendments to the petition and schedules on application of the petitioner. Amendments shall be printed or written, signed and

verified, like original petitions and schedules. If amendments are made to separate schedules, the same must be made separately, with proper references. In the application for leave to amend, the petitioner shall state the cause of the error in the paper originally filed.

XII. DUTIES OF REFEREE.

[87] 1. The order referring a case to a referee shall name a day upon which the bankrupt shall attend before the referee; and from that day the bankrupt shall be subject to the orders of the court in all matters relating to his bankruptcy, and may receive from the referee a protection against arrest, to continue until the final adjudication on his application for a discharge, unless suspended or vacated by order of the court. A copy of the order shall forthwith be sent by mail to the referee, or be delivered to him personally by the clerk or other officer of the court. And thereafter all the proceedings, except such as are required by the act or by these general orders to be had before the judge, shall be had before the referee.

2. The time when and the place where the referees shall act upon the matters arising under the several cases referred to them shall be fixed by special order of the judge, or by the referee; and at such times and places the referees may perform the duties which they are empowered by the act to perform.

3. Applications for a discharge, or for the approval of a composition, or for an injunction to stay proceedings of a court or officer of the United States or of a State, shall be heard and decided by the judge. But he may refer such an application, or any specified issue arising thereon, to the referee to ascertain and report the facts.

XIII. APPOINTMENT AND REMOVAL OF TRUSTEE.

[88] The appointment of a trustee by the creditors shall be subject to be approved or disapproved by the referee or by the judge; and he shall be removable by the judge only.

XIV. NO OFFICIAL OR GENERAL TRUSTEE.

[89] No official trustee shall be appointed by the court, nor any general trustee to act in classes of cases.

XV. TRUSTEE NOT APPOINTED IN CERTAIN CASES.

[90] If the schedule of a voluntary bankrupt discloses no assets, and if no creditor appears at the first meeting, the court may, by order setting out the facts, direct that no trustee be appointed; but at any time thereafter a trustee may be appointed, if the court shall deem it desirable. If no trustee is appointed as aforesaid, the court may order that no meeting of the creditors other than the first meeting shall be called.

XVI. NOTICE TO TRUSTEE OF HIS APPOINTMENT.

[91] It shall be the duty of the referee, immediately upon the appointment and approval of the trustee, to notify him in person or by mail of his appointment; and the notice shall require the trustee forthwith to notify the referee of his acceptance or rejection of the trust, and shall contain a statement of the penal sum of the trustee's bond.

XVII. DUTIES OF TRUSTEE.

[92] The trustee shall, immediately upon entering upon his duties, prepare a complete inventory of all the property of the bankrupt that comes into his possession. The trustee shall make report to the court, within twenty days after receiving the notice of his

appointment, of the articles set off to the bankrupt by him, according to the provisions of the forty-seventh section of the act, with the estimated value of each article, and any creditor may take exceptions to the determination of the trustee within twenty days after the filing of the report. The referee may require the exceptions to be argued before him, and shall certify them to the court for final determination at the request of either party. In case the trustee shall neglect to file any report or statement which it is made his duty to file or make by the act, or by any general order in bankruptcy, within five days after the same shall be due, it shall be the duty of the referee to make an order requiring the trustee to show cause before the judge, at a time specified in the order, why he should not be removed from office. The referee shall cause a copy of the order to be served upon the trustee at least seven days before the time fixed for the hearing, and proof of the service thereof to be delivered to the clerk. All accounts of trustees shall be referred as of course to the referee for audit, unless otherwise specially ordered by the court.

XVIII. SALE OF PROPERTY.

[93] 1. All sales shall be by public auction unless otherwise ordered by the court.

2. Upon application to the court, and for good cause shown, the trustee may be authorized to sell any specified portion of the bankrupt's estate at private sale; in which case he shall keep an accurate account of each article sold, and the price received therefor, and to whom sold; which account he shall file at once with the referee.

3. Upon petition by a bankrupt, creditor, receiver

or trustee, setting forth that a part or the whole of the bankrupt's estate is perishable, the nature and location of such perishable estate, and that there will be loss if the same is not sold immediately, the court, if satisfied of the facts stated and that the sale is required in the interest of the estate, may order the same to be sold, with or without notice to the creditors, and the proceeds to be deposited in court.

XIX. ACCOUNTS OF MARSHAL.

[94] The marshal shall make return, under oath, of his actual and necessary expenses in the service of every warrant addressed to him, and for custody of property, and other services, and other actual and necessary expenses paid by him, with vouchers therefor whenever practicable, and also with a statement that the amounts charged by him are just and reasonable.

XX. PAPERS FILED AFTER REFERENCE.

[95] Proofs of claims and other papers filed subsequently to the reference, except such as call for action by the judge, may be filed either with the referee or with the clerk.

XXI. PROOF OF DEBTS.

[96] 1. Depositions to prove claims against a bankrupt's estate shall be correctly entitled in the court and in the cause. When made to prove a debt due to a partnership, it must appear on oath that the deponent is a member of the partnership; when made by an agent, the reason the deposition is not made by the claimant in person must be stated; and when made to prove a debt due to a corporation, the deposition shall be made by the treasurer, or, if the corporation

has no treasurer, by the officer whose duties most nearly correspond to those of treasurer. Depositions to prove debts existing in open account shall state when the debt became or will become due; and if it consists of items maturing at different dates the average due date shall be stated, in default of which it shall not be necessary to compute interest upon it. All such depositions shall contain an averment that no note has been received for such account, nor any judgment rendered thereon. Proofs of debt received by any trustee shall be delivered to the referee to whom the cause is referred.

2. Any creditor may file with the referee a request that all notices to which he may be entitled shall be addressed to him at any place, to be designated by the postoffice box or street number, as he may appoint; and thereafter, and until some other designation shall be made by such creditor, all notices shall be so addressed; and in other cases notices shall be addressed as specified in the proof of debt.

3. Claims which have been assigned before proof shall be supported by a deposition of the owner at the time of the commencement of proceedings, setting forth the true consideration of the debt and that it is entirely unsecured, or if secured, the security, as is required in proving secured claims. Upon the filing of satisfactory proof of the assignment of a claim proved and entered on the referee's docket, the referee shall immediately give notice by mail to the original claimant of the filing of such proof of assignment; and, if no objection be entered within ten days, or within further time allowed by the referee, he shall make an order subrogating the assignee to the original claimant. If objection be made, he shall proceed to hear and determine the matter.

4. The claims of persons contingently liable for the bankrupt may be proved in the name of the creditor when known by the party contingently liable. When the name of the creditor is unknown, such claim may be proved in the name of the party contingently liable; but no dividend shall be paid upon such claim, except upon satisfactory proof that it will diminish (*pro tanto*) the original debt.

5. The execution of any letter of attorney to represent a creditor, or of an assignment of claim after proof, may be proved or acknowledged before a referee, or a United States commissioner, or a notary public. When executed on behalf of a partnership or of a corporation, the person executing the instrument shall make oath that he is a member of the partnership, or a duly authorized officer of the corporation on whose behalf he acts. When the person executing is not personally known to the officer taking the proof or acknowledgment, his identity shall be established by satisfactory proof.

6. When the trustee or any creditor shall desire the re-examination of any claim filed against the bankrupt's estate, he may apply by petition to the referee to whom the case is referred for an order for such re-examination, and thereupon the referee shall make an order fixing a time for hearing the petition, of which due notice shall be given by mail addressed to the creditor. At the time appointed the referee shall take the examination of the creditor, and of any witnesses that may be called by either party, and if it shall appear from such examination that the claim ought to be expunged or diminished, the referee may order accordingly.

XXII. TAKING OF TESTIMONY.

[97] The examination of witnesses before the referee may be conducted by the party in person or by his counsel or attorney, and the witnesses shall be subject to examination and cross-examination, which shall be had in conformity with the mode now adopted in courts of law. A deposition taken upon an examination before a referee shall be taken down in writing by him, or under his direction, in the form of narrative, unless he determines that the examination shall be by question and answer. When completed it shall be read over to the witness and signed by him in the presence of the referee. The referee shall note upon the deposition any question objected to, with his decision thereon; and the court shall have power to deal with the costs of incompetent, immaterial, or irrelevant depositions, or parts of them, as may be just.

XXIII. ORDERS OF REFEREE.

[98] In all orders made by a referee, it shall be recited, according as the fact may be, that notice was given and the manner thereof; or that the order was made by consent; or that no adverse interest was represented at the hearing; or that the order was made after hearing adverse interests.

XXIV. TRANSMISSION OF PROVED CLAIMS TO CLERK.

[99] The referee shall forthwith transmit to the clerk a list of the claims proved against an estate, with the names and addresses of the proving creditors.

XXV. SPECIAL MEETING OF CREDITORS.

[100] Whenever, by reason of a vacancy in the office of trustee, or for any other cause, it becomes necessary to call a special meeting of the creditors in

order to carry out the purposes of the act, the court may call such a meeting, specifying in the notice the purpose for which it is called.

XXVI. ACCOUNTS OF REFEREE.

[101] Every referee shall keep an accurate account of his travelling and incidental expenses, and of those of any clerk or other officer attending him in the performance of his duties in any case which may be referred to him; and shall make return of the same under oath to the judge, with proper vouchers when vouchers can be procured, on the first Tuesday in each month.

XXVII. REVIEW BY JUDGE.

[102] When a bankrupt, creditor, trustee, or other person shall desire a review by the judge of any order made by the referee, he shall file with the referee his petition therefor, setting out the error complained of; and the referee shall forthwith certify to the judge the question presented, a summary of the evidence relating thereto, and the finding and order of the referee thereon.

XXVIII. REDEMPTION OF PROPERTY AND COMPOUNDING OF CLAIMS.

[103] Whenever it may be deemed for the benefit of the estate of a bankrupt to redeem and discharge any mortgage or other pledge, or deposit or lien, upon any property, real or personal, or to relieve said property from any conditional contract, and to tender performance of the conditions thereof, or to compound and settle any debts or other claims due or belonging to the estate of the bankrupt, the trustee, or the bankrupt, or any creditor who has proved his debt, may file his

petition therefor; and thereupon the court shall appoint a suitable time and place for the hearing thereof, notice of which shall be given as the court shall direct, so that all creditors and other persons interested may appear and show cause, if any they have, why an order should not be passed by the court upon the petition authorizing such act on the part of the trustee.

XXIX. PAYMENT OF MONEYS DEPOSITED.

[104] No moneys deposited as required by the act shall be drawn from the depository unless by check or warrant, signed by the clerk of the court, or by a trustee, and countersigned by the judge of the court, or by a referee designated for that purpose, or by the clerk or his assistant under an order made by the judge, stating the date, the sum, and the account for which it is drawn; and an entry of the substance of such check or warrant, with the date thereof, the sum drawn for, and the account for which it is drawn, shall be forthwith made in a book kept for that purpose by the trustee or his clerk; and all checks and drafts shall be entered in the order of time in which they are drawn, and shall be numbered in the case of each estate. A copy of this general order shall be furnished to the depository, and also the name of any referee or clerk authorized to countersign said checks.

XXX. IMPRISONED DEBTOR.

[105] If, at the time of preferring his petition, the debtor shall be imprisoned, the court, upon application, may order him to be produced upon *habeas corpus*, by the jailer or any officer in whose custody he may be, before the referee, for the purpose of testifying in any matter relating to his bankruptcy; and, if committed after the filing of his petition upon process in any civil

action founded upon a claim provable in bankruptcy, the court may, upon like application, discharge him from such imprisonment. If the petitioner, during the pendency of the proceedings in bankruptcy, be arrested or imprisoned upon process in any civil action, the district court, upon his application, may issue a writ of *habeas corpus* to bring him before the court to ascertain whether such process has been issued for the collection of any claim provable in bankruptcy, and if so provable he shall be discharged; if not, he shall be remanded to the custody in which he may lawfully be. Before granting the order for discharge the court shall cause notice to be served upon the creditor or his attorney, so as to give him an opportunity of appearing and being heard before the granting of the order.

XXXI. PETITION FOR DISCHARGE.

[106] The petition of a bankrupt for a discharge shall state concisely, in accordance with the provisions of the act and the orders of the court, the proceedings in the case and the acts of the bankrupt.

XXXII. OPPOSITION TO DISCHARGE OR COMPOSITION.

[107] A creditor opposing the application of a bankrupt for his discharge, or for the confirmation of a composition, shall enter his appearance in opposition thereto on the day when the creditors are required to show cause, and shall file a specification in writing of the grounds of his opposition within ten days thereafter, unless the time shall be enlarged by special order of the judge.

XXXIII. ARBITRATION.

[108] Whenever a trustee shall make application to the court for authority to submit a controversy arising in the settlement of a demand against a bank-

rupt's estate, or for a debt due to it, to the determination of arbitrators, or for authority to compound and settle such controversy by agreement with the other party, the application shall clearly and distinctly set forth the subject-matter of the controversy, and the reasons why the trustee thinks it proper and most for the interest of the estate that the controversy should be settled by arbitration or otherwise.

XXXIV. COSTS IN CONTESTED ADJUDICATIONS.

[109] In cases of involuntary bankruptcy, when the debtor resists an adjudication, and the court, after hearing, adjudges the debtor a bankrupt, the petitioning creditor shall recover, and be paid out of the estate, the same costs that are allowed to a party recovering in a suit in equity; and if the petition is dismissed, the debtor shall recover like costs against the petitioner.

XXXV. COMPENSATION OF CLERKS, REFEREES AND TRUSTEES.

[110] 1. The fees allowed by the act to clerks shall be in full compensation for all services performed by them in regard to filing petitions or other papers required by the act to be filed with them, or in certifying or delivering papers or copies of records to referees or other officers, or in receiving or paying out money; but shall not include copies furnished to other persons, or expenses necessarily incurred in publishing or mailing notices or other papers.

2. The compensation of referees, prescribed by the act, shall be in full compensation for all services performed by them under the act, or under these general orders, but shall not include expenses necessarily incurred by them in publishing or mailing notices,

in traveling, or in perpetuating testimony, or other expenses necessarily incurred in the performance of their duties under the act and allowed by special order of the judge.

3. The compensation allowed to trustees by the act shall be in full compensation for the services performed by them; but shall not include expenses necessarily incurred in the performance of their duties and allowed upon the settlement of their accounts.

This general order was amended December 11, 1905, by adding at the end thereof the words: He may also, pending such proceeding, both in voluntary and involuntary cases, order the commissions of referees and trustees to be paid immediately after such commissions accrue and are earned.

4. In any case in which the fees of the clerk, referee and trustee are not required by the act to be paid by a debtor before filing his petition to be adjudged a bankrupt, the judge, at any time during the pendency of the proceedings in bankruptcy, may order those fees to be paid out of the estate; or may, after notice to the bankrupt, and satisfactory proof that he then has or can obtain the money with which to pay those fees, order him to pay them within a time specified, and, if he fails to do so, may order his petition to be dismissed. He may also, pending such proceedings, both in voluntary and involuntary cases, order the commissions of referees and trustees to be paid immediately after such commissions accrue and are earned

XXXVI. APPEALS.

[111] 1. Appeals from a court of bankruptcy to a circuit court of appeals, or to the supreme court of a territory, shall be allowed by a judge of the court

appealed from or of the court appealed to, and shall be regulated, except as otherwise provided in the act, by the rules governing appeals in equity in the courts of the United States.

2. Appeals under the act to the Supreme Court of the United States from a circuit court of appeals, or from the supreme court of a Territory, or from the supreme court of the District of Columbia, or from any court of bankruptcy whatever, shall be taken within thirty days after the judgment or decree, and shall be allowed by a judge of the court appealed from, or by a justice of the Supreme Court of the United States.

3. In every case in which either party is entitled by the act to take an appeal to the Supreme Court of the United States, the court from which the appeal lies shall, at or before the time of entering its judgment or decree, make and file a finding of the facts, and its conclusions of law thereon, stated separately; and the record transmitted to the Supreme Court of the United States on such an appeal shall consist only of the pleadings, the judgment or decree, the finding of facts, and the conclusions of law.

XXXVII. GENERAL PROVISIONS.

[112] In proceedings in equity, instituted for the purpose of carrying into effect the provisions of the act, or for enforcing the rights and remedies given by it, the rules of equity practice established by the Supreme Court of the United States shall be followed as nearly as may be. In proceedings at law, instituted for the same purpose, the practice and procedure in cases at law shall be followed as nearly as may be. But the judge may, by special order in any case, vary the time allowed for return of process for appearance and

pleading, and for taking testimony and publication, and may otherwise modify the rules for the preparation of any particular case so as to facilitate a speedy hearing.

XXXVIII. FORMS.

[113] The several forms annexed to these general orders shall be observed and used, with such alterations as may be necessary to suit the circumstances of any particular case.

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1. Give an outline of the history of its origin and development.

Page 20.

1. What was the origin of bills and notes?

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1. Define promissory notes.
2. What are the essentials of promissory notes?

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1. What is the most characteristic feature of bills and notes?

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1. Is consideration necessary in the cases of bills and notes?

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1. What are the liabilities of acceptors and drawers after acceptance?
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1. What is acceptance supra protest?
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1. In what does the dual character of the contract of the indorser consist?
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1. What will constitute a valuable consideration?

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1. What are its essentials?

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Page 54.

1. When the maker of a note or the acceptor of a bill is dead to whom should presentment be made?

Page 55.

1. What is the effect of failure to present a bill or note for payment?

Page 56.

1. What is notice of dishonor?
2. How should it be given?

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1. What should a notice of dishonor contain?

Page 58.

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1. What are the principal excuses for failure to present or give notice?
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1. How are defenses to bills and notes classified?
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Page 64.

1. What is the position of bills and notes declared void by statute?

Page 65.

1. What is the effect of forgery or alteration of a negotiable instrument?

Pages 66-69.

1. What is the effect of fraud or duress?

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1. Define checks.

Page 74.

1. What is the liability of banks to checks?

Pages 75-76.

1. Discuss the presentment and protest of checks.

CHAPTER X.

Pages 77-78.

1. Give a brief outline of the history of the negotiable instrument act.

Pages 79-127.

1. Answer all previous questions on this subject in accordance with the terms of the Uniform negotiable Instruments Acts.

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Page 131.

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2. What is the general nature of the contract of suretyship?
3. Who are the parties to the contract?

Page 132.

1. How old is the surety form of contract?
2. What are the essentials of this form of contract?

Page 133.

1. Who is the principal?
2. What is Judge Cooley's definition of a surety?

Page 134.

1. What are some of the prerequisites in order to make the promise, to answer for the debt of another, a contract of suretyship?

Pages 135-136.

1. State some of the distinctions that are made between a surety and a guarantor.

Page 137.

1. Is a surety ever held beyond the express terms of the contract?
2. What is meant by the expression that a surety is a favorite of the law?

Page 138.

1. Define a co-surety, and state what things are essential to constitute one a co-surety.

2. What is the extent of the co-surety's right of contribution against his co-surety?

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1. Is the grantee or grantor of mortgaged premises a surety?
2. Can property itself be considered as a surety, where it is security for the debt?

Page 140.

1. When have certain persons the rights of sureties although not sureties in fact?
2. Are joint promissors to be considered as sureties for each other?

Page 143.

1. Who in general may contract as a surety?

Page 144.

1. Can an infant make a valid contract as a surety? If not, is the contract voidable or void?

Page 145.

1. Can a married woman at common law or at the present time make a contract of suretyship?
2. Can an insane person make a contract of suretyship?

Page 146.

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1. What consideration is necessary to support the surety's contract?
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1. Is the surety bound when having signed an incomplete instrument his agent fills in blanks contrary to the surety's instruction?

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1. Can one claim the rights of a surety, where being a surety in fact he calls himself a principal in the contract?
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1. Is a surety ever held for any sum beyond the amount for which he binds himself?

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1. Give certain instances where a surety was held not liable on suit brought.

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1. Can a surety ever terminate his liability by giving notice?

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1. In general, what things will discharge the surety from liability on his contract?

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1. Give some illustrations of discharge by alteration of the contract.

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1. Does alteration always discharge?

Page 165.

1. How may the surety show discharge by fraud of the creditor?
2. When will concealment, or failure to disclose facts known to the creditor, amount to fraud?

Pages 167-168.

1. What are some of the rights and remedies of a surety against the creditor, on suit being instituted against the surety?

Pages 168-170.

1. What rights and remedies has a surety against the principal, after he pays the debt and before the debt is paid?

Pages 171-172.

1. Enumerate the rights and remedies of a surety against his co-sureties.

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1. What acts of a surety will discharge his co-surety from contribution?

Pages 172-173.

1. State the proportion that each co-surety is bound to contribute, when the action is in law, and in equity.

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1. State what you understand by the doctrine of equitable subrogation, and how far the right is available to the surety.

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1. Can the surety claim the right to be subrogated to the lien of the judgment against the principal secured by the creditor?
2. What is Conventional Subrogation?

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1. What do you understand, by the doctrine of equitable contribution?
2. Is the right to the same allowed the surety?

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2. How are guaranty contracts classified?

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1. Give illustrations of the different kinds of guaranties.

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1. Distinguish an absolute from a conditional guaranty.

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2. Is notice on the part of the creditor, of the principal's default, necessary in order to make the conditional or absolute guarantor liable?

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Page 190.

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1. What constitute acts of bankruptcy?

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1. Are set-offs allowed in bankruptcy proceedings?

APPENDIX A.

ADMINISTRATOR'S BOND.

KNOW ALL MEN BY THESE PRESENTS, That we, JOHN SMITH, PRINCIPAL, and JOHN JONES, and JAMES JONES, SURETIES, of the County of Cook and State of Illinois, are held and firmly bound unto the People of the State of Illinois, in the penal sum of FIVE THOUSAND (\$5,000.00) DOLLARS, current money of the United States, which payment well and truly to be made and performed, we and each of us bind ourselves, executors and administrators, jointly, severally and firmly by these presents.

Witness our hands and seals this First day of SEPTEMBER, A. D. 1908.

THE CONDITION OF THE ABOVE OBLIGATION IS SUCH, That if the said John Smith, Administrator, of all and singular the goods and chattels, rights and credits of John Adams, deceased, do make or cause to be made, a true and perfect inventory of all and singular the goods and chattels, rights and credits of the said deceased, which shall come to the hands, possession or knowledge of him, the said John Smith, as administrator, or to the hands of any person or persons for him, and the same so made, do exhibit or cause to be exhibited, in the Probate Court of the said County of Cook, agreeably to law; and such goods and chattels, rights and credits, do well and truly administer, according to law, all the rest of the said goods, and chattels, rights and credits which shall be found remaining upon the account of the said admin-

istrator, the same being at first examined and allowed by the court, shall deliver and pay unto such person or persons, respectively, as may be legally entitled thereto; and further do make a just and true account of all his actings and doings therein, when thereunto required by the said court, and if it shall appear that any last will and testament was made by the deceased, and the same be proved in court, and letters testamentary or of administration be obtained thereon, and the said John Smith, do in such case, on being required thereto, render and deliver up the letters of administration granted to him, as aforesaid, and shall, in general, do and perform all other acts which may at any time be required of him by law, then this obligation to be void; otherwise to remain in full force and virtue.

JOHN SMITH, (SEAL.)
Residence, 353 LaSalle Ave., Chicago, Ill.
JOHN JONES, (SEAL.)
Residence, 354 Chicago Ave., Chicago, Ill.
JAMES JONES, (SEAL.)
Residence, 354 Chicago Ave., Chicago, Ill.

BOND OF CASHIER.

KNOW ALL MEN BY THESE PRESENTS, That we, JOHN DOE and RICHARD ROE of Chicago, Illinois, are held and firmly bound unto JOHN ADAMS of Chicago, Illinois, in the sum of \$5,000.00, to be paid to the said JOHN ADAMS, his executors, administrators, or assigns, for which payment we well and truly bind ourselves, our heirs, executors and assigns firmly by these presents.

Sealed with our seals and dated this Seventh day of JULY, 1908.

THE CONDITION OF THE ABOVE OBLIGATION IS SUCH, That whereas the said John Adams has employed the said John Doe as his cashier in his business, as a retail dry goods merchant; now, therefore, if the said John Doe shall well and faithfully and honestly discharge his duties as such cashier, and shall account for all money or moneys coming into his hands as such cashier, and of other property belonging to the said John Adams, coming into his hands, or under his control, then the above obligation is to become null and void, and of no force and effect, otherwise to remain in full force and effect.

JOHN DOE, (SEAL.)

RICHARD ROE. (SEAL.)

TABLE OF CASES.

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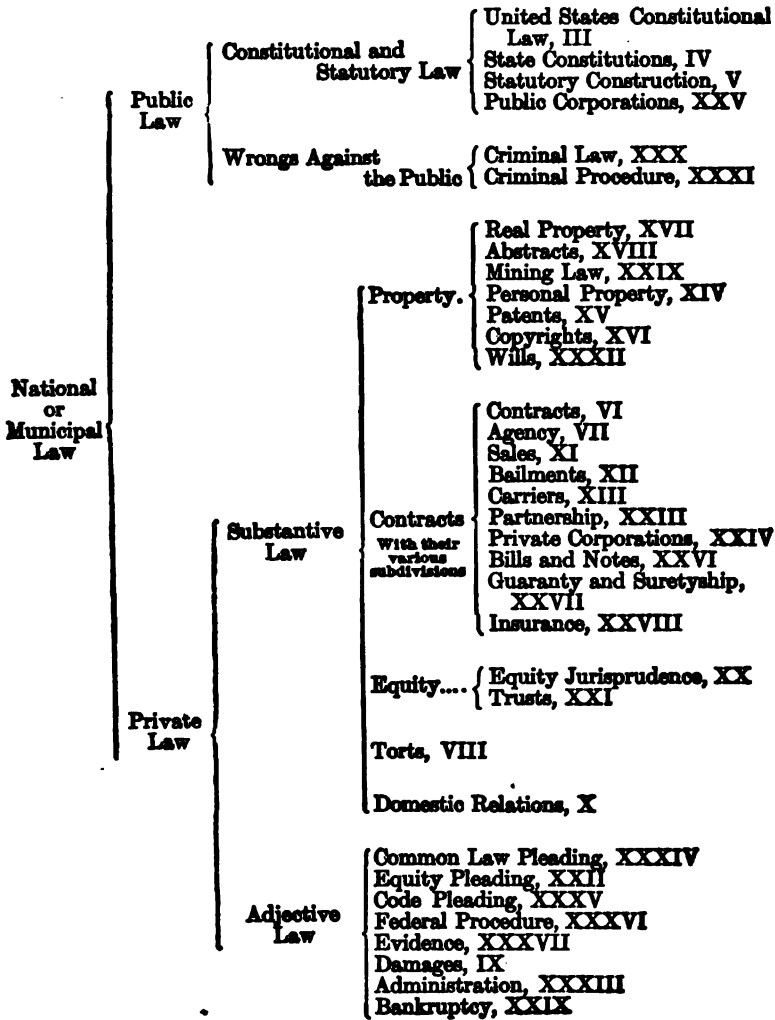
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